72-1697

FILED

JUN 15

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

72-1697

No. A-1148

MARVIN ALLEN SHAFER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION ON BEHALF OF DEFENDANT-APPELLANT, MARVIN ALLEN SHAFER

JOHN D. LOCKRIDGE
Valley Fidelity Bank Building
Knoxville, Tennessee 37901
Attorney for Defendant-Appellant

Of Counsel
BARRY G. ZEPKE
Valley Fidelity Bank Building
Knoxville, Tennessee 37901

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes, Federal Rules, and Regulations Involved 2

Statement 3

Reasons for Granting the Writ 4

Conclusion 8

Appendix—

Relevant Docket Entries A1

Indictment A2

Excerpt from Transcript of Proceedings A3

[Defendant's] Proposed Instructions Nos. 1, 2, 3 .... A4

Judgment and Commitment A4

Notice of Appeal A6

Order A7

Defendant-Appellant's Motion for Extension of Time to File Brief and Appendix A7

Order A9

Motion for Extension of Time Within Which to File Petition for Writ of Certiorari A10

Order Extending Time to File Petition for Writ of Certiorari A13

Pertinent Portions of Transcript of Proceedings A14

Citations

CASES

Arellanes v. *U. S.*, 302 F.2d 603 (9th C.C.A. 1962) 6

Crosby v. *U. S.*, 339 F.2d 743 (1964) 8

Greene v. *U. S.*, 383 F.2d 199, 127 U.S. App. D.C. 272, 390 U.S. 961, 88 S.Ct. 1061, 19 L.Ed.2d 1158 8
Lopez v. *U. S.*, 373 U.S. 435, 83 S.Ct. 1831 5
Masciale v. *U. S.*, 356 U.S. 386, 78 S.Ct. 827, 2 L.Ed.2d 859 5
Moody v. *U. S.*, 376 F.2d 525 (9th C.C.A. 1967) 5,6
Sherman v. *U. S.*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 5
Sorrell v. *U. S.*, 378 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 5
U. S. v. *Bueno*, 447 F.2d 903 (5th C.C.A. 1971) 4,5
U. S. v. *Chisum*, 436 F.2d 645 (9th C.C.A. 1971) 4
U. S. v. *Dillet*, 260 F. Supp. 980 (1966) 4
U. S. v. *Hernandez*, 290 F.2d 86 (2nd C.C.A. 1961) 6
U. S. v. *Sinclair*, 444 F.2d 890 (D.C. Circuit 1971) 8
Williams v. *U. S.*, 328 F.2d 256 (Ct. App. Missouri, 1964), 377 U.S. 969, 84 S.Ct. 1651, 12 L.Ed.2d 839 18

STATUTES

21 U.S.C. 812, Schedule III 2
21 U.S.C. 841 (a)(1) 2

MISCELLANEOUS

Federal Rules of Criminal Procedure, Rule 31 (c) 2,7

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. A-1148

MARVIN ALLEN SHAFER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Counsel for petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 17, 1973.

OPINIONS BELOW

The Judgment of the District Court for the Eastern District of Tennessee, Northern Division, is unreported. The Opinion of the Court of Appeals for the Sixth Circuit is unreported to date. The Judgment of the District Court is appended to this petition at page A5.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on April 17, 1973, and copies thereof are appended to this petition in the Appendix at page A7. The Jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254.

QUESTIONS PRESENTED

I. Was the Court of Appeals for the Sixth Circuit correct in affirming the decision of the District Court in refusing to hold that defendant-appellant was entrapped as a matter of law?

II. Was the Circuit Court of Appeals for the Sixth Circuit correct in affirming the decision of the District Court which held that there was sufficient evidence presented to warrant a conviction for possession with the intent to distribute Amphetamines by the defendant-appellant?

III. Was the Court of Appeals for the Sixth Circuit correct in affirming the District Court's refusal to give the jury an instruction concerning the lesser included offense of mere possession?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

Portions of 21 U.S. Code, Section 812 and 21 U.S. Code, Section 841 (a)(1) and Rule 31(c) of the Federal Rules of Criminal Procedure.

STATEMENT

On June 19, 1971, one Elmer Johnston crossed the border from Mexico into Brownsville, Texas, and when he was accosted by customs agents in Texas, he proved to be carrying a quantity of Amphetamine and Biphetamine capsules in violation of 21 U.S. Code, Section 812. Johnston implicated the defendant-appellant by making a statement to the customs agents as to where he was headed with the said drugs and who he was to contact. Johnston subsequently agreed to come to Knoxville, Tennessee, and "set up" the defendant-appellant. Johnston accompanied by several agents then made the trip to Knoxville and contacted defendant-appellant and a meeting was set up between these two. Defendant-appellant then met with Johnston and a suitcase alleged to contain Amphetamine and Biphetamine capsules was exchanged between these two, but when agents attempted to apprehend defendant-appellant, he fled successfully. Sometime subsequent thereto, defendant-appellant heard that he was being sought by federal agents and he voluntarily turned himself in and was subsequently charged in a one-count indictment (A2-A3) alleging that on or about June 20, 1971, he knowingly and intentionally in said district in Knoxville, Tennessee, did unlawfully possess with intent to distribute and dispense a controlled substance in violation of 21 U.S. Code, Section 812.

REASONS FOR GRANTING THE WRIT

I. The decision below should be reviewed because that Court should have held that the defendant was entrapped as a matter of law. The decision sought to be reviewed in this case is in apparent conflict with decisions rendered by other Circuits when faced with entrapment questions. In the case of *U. S.* v. *Bueno,* 447 F.2d 903 (5th Cir. 1971), the Court held that the defendant was entrapped as a matter of law where the government informer furnished heroin for sale by the defendant to a government agent. The agent had been introduced to defendant by the informer and was aware of certain activities of the informer, even though he did not appear to know who furnished the heroin which was sold to him. The Court held, citing cases from other Circuits, that defendant was entrapped as a matter of law when the informer furnished the goods to defendant, which made it possible for the defendant to participate in a subsequent criminal offense. See *U. S.* v. *Dillet,* 265 F. Supp. 980 (1966) and *U. S.* v. *Chisum,* 436 F.2d 645 (9th Cir. 1971).

In the instant case, the defendant-appellant was 1000 miles from the scene of the smuggling activity conducted by the aforesaid Johnston. Customs agent allowed the drugs to enter the United States, then allowed the drugs to be transported to Knoxville, Tennessee, and then allowed the "informer" to rendezvous with the defendant-appellant and to hand him a closed suitcase which the government contends contained Amphetamines as aforesaid. Notwithstanding that no further proof was introduced that the suitcase did in fact contain any Amphetamines, the crux of the matter is that defendant-appellant had not and could not obtain any such Amphetamines without being entrapped by the informer and the government acting in conjunction. The government traveled through several states and covered many hundreds of miles in its attempt

to eventually place such Amphetamines in the appellant's possession so that they could then seize him upon his receiving them from the government's own agent. Hence, the government perpetrated and in effect "kept alive" the possibility of someone committing a subsequent criminal offense and then being charged therefor.

In *Bueno,* the Fifth Circuit reversed defendant's conviction holding that defendant was entrapped as a matter of law. Other cases from this very Court which affirm, as it were, the holding of the Fifth Circuit are: *Sorrell* v. *United States,* 387 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413; *Lopez* v. *United States,* 373 U.S. 435, 83 S.Ct. 1831; *Masciale* v. *United States,* 356 U.S. 386, 78 S.Ct. 827, 2 L.Ed.2d 859; *Sherman* v. *United States,* 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848.

II. The Court should grant this Writ for a Petition of Certiorari because under the offense as charged in the indictment, possession is the gravamen of the offense and with the new federal rules of evidence, new impetus toward standardized admission of evidence among the Federal District Courts requires that this Court clarify what constitutes possession. There are many Circuit decisions which attempt to distinguish between actual and constructive possession in an attempt to extend the long arm of the law to reach those defendants charged with crimes of which possession is an element but who were not in possession of contraband or drugs when arrested. In the case of *Moody* v. *U. S.,* 376 F.2d 525 (9th Cir. 1967), the defendant was convicted of unlawful importation of narcotic drugs and also of concealing and transporting unlawfully imported narcotic drugs. In this case, defendant was not present at the time of the seizure of the drugs and in fact, was not ever in possession of the drugs after they were brought into the United States. The defendant and an accomplice bought the drugs in Mexico and the ac-

complice was to bring the drugs into the United States and then pick up defendant on the other side of the border. The accomplice was caught attempting to cross the border and when the drugs were found, defendant was charged as aforesaid. The subsequent conviction was reversed on other grounds, but the Court discussed the constructive possession aspect and indicated that such possession can occur when one is in control of the drugs, even though they are in someone else's possession.

The distinguishing factor between *Moody* and the present case however, is the degree of control exerted over the drugs by the petitioner. In *Moody*, the petitioner was waiting on the other side of the border, armed and dangerous, and exercising control over the drugs. In the instant case, petitioner was 1000 miles away and able to exercise no control whatever, and certainly not enough dominion and control to be held to have possessed the drugs.

In *Arellanes* v. *U. S.*, 302 F.2d 603 (9th Cir. 1962), the Court held that merely being in proximity to the drugs and even knowing them to be there would not necessarily constitute "possession". In *U. S.* v. *Hernandez*, 290 F.2d 86 (2nd Cir. 1961), the Second Circuit held that a mere association with a person who controls such drugs does not constitute possession. The Court went so far as to say that a casual facilitator who knows that a given principal has narcotics but who cannot assure delivery does not have "possession". In the instant case, defendant-appellant could not be said to have had "possession" of drugs of which he had no knowledge as to where or when or even if such drugs were to be brought into this country. Further, up to and including the first and only contact which agents had with the alleged defendant, the drugs were in the possession of Johnston as aforesaid and they were not in proximity to defendant-appellant. After

Johnston rendezvoused with the defendant-appellant no drugs were ever seen again and there was positively no evidence whatsoever to show that any drugs had ever been confiscated from the possession of the defendant nor from the possession of any one in proximity to the defendant, nor from any property under the dominion and control of the defendant. In short, the only evidence introduced that defendant ever possessed any drugs was by word of mouth from Mr. Johnston and without any "corpus delicti" to sustain this conviction, it should be reversed.

In the case at bar, the only time any drugs were ever seized was in Texas when the drugs were first brought across the border from Mexico. At that time, the aforesaid, Johnston, was in complete control and possession of the drugs and as a matter of fact, agents watched him extensively for some period of time before they seized the drugs. Subsequent to this time, no drugs were ever seen, seized or apprehended by any agents for the government. In fact, to this day, no drugs have ever been seized from defendant, from defendant's automobile, from any other possession of defendant, from defendant's house, nor from anyone under defendant's dominion and/or control.

III. This Petition for Certiorari should be granted because the important federal question of interpretation of Rule 31(c) of the Federal Rules of Criminal Procedure needs to be clarified.

In the case at bar, the only time any drugs were a lesser included offense instruction (see Appendix page A4). Upon a verdict of guilty by the jury, the District Judge then proceeded to impose the maximum permissible punishment of five (5) years upon the defendant for possession with intent to distribute. The Courts have held that consistent with Rule 31(c), the accused is entitled

to a lesser included offense instruction where the greater offense cannot be committed without also committing the lesser offense. See *Crosby* v. *U. S.*, 339 F.2d 743 (1964 case). In *U. S.* v. *Sinclair*, 444 F.2d 890 (Dist. of Columbia Circuit Court, 1971), this Circuit Court held that if counsel asked for lesser offense instruction it should be freely given, but there must be some evidence to support a lesser offense instruction, that is, there must be some rational basis for such an instruction.

In the case before the Court, all of the elements of possession are necessarily included in the elements of possession with the intent to distribute and it would not be possible to possess with intent to distribute without also possessing. No evidence was introduced at the trial to adduce any motive on the part of defendant-appellant as to possession and it is certainly not wholly incredible that the defendant-appellant had no intention to distribute any such drugs.

The Court has denied Certiorari in at least two previous cases involving this point of law and it represents a federal question which this Court should deal with. See *Greene* v. *U. S.*, 383 F.2d 199, 127 U.S. App. Dist. of Columbia 272 (1967), 390 U.S. 961 (Certiorari denied) and also *Williams* v. *U. S.*, 328 F.2d 256 (Ct. of App. Missouri 1964), 377 U.S. 969 (Certiorari denied).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN D. LOCKRIDGE
Attorney for Defendant-Appellant

RELEVANT DOCKET ENTRIES

April 28, 1972 Indictment filed.

May 10, 1972 Plea of not guilty. Entered in Order Book 60, page 239.

May 16, 1972 Subpoena for two U.S. witnesses returned executed at Knoxville, Tenn., on May 16, 1972.

May 19, 1972 Memorandum in support of motion for discovery and inspection filed.

May 19, 1972 Motion for discovery and inspection filed.

May 23, 1972 Motion for discovery and inspection sustained as to paragraphs (a), (c) and (f) and denied as to paragraphs (b) (d) and (e), except as to defendant's own statement, filed. Copy to attys by clerk.

May 24, 1972 Response to Motion for Discovery and Inspection filed.

May 25, 1972 Government's jury charge request, filed.

May 29, 1972 Order of trial by jury: Plaintiff's evidence heard; defendant's motion for verdict of acquittal heard and overruled; defendant's evidence heard; argument and charge heard. Verdict: Guilty—referred to probation officer for pre-sentence investgation and placed in custody of U.S. Marshal without bond.

May 29, 1972 Exhibits filed.

May 30, 1972 Proposed Instruction No. 1, Proposed Instruction No. 2 and Proposed Instruction No. 3 filed.

June 6, 1972 Subpoena for one U.S. witness returned executed on May 25, 1972, at Brownsville Texas; and filed.

June 27, 1972 JUDGMENT: Five (5) Years from and after this date; subject to parole; entered in Order Book 61, page 85. Copies to U. S. Marshal, U. S. Attorney and

probation office. Defendant advised of his right to appeal in forma pauperis; motion for bond heard and denied; ent'd Order Book 61, p. 79.

June 30, 1972 Notice of appeal by defendant, filed. Copy to U.S. Attorney by Clerk.

July 3, 1972 Certified copy of docket entries and notice of appeal mailed to Clerk, U.S. Court of Appeals, Cincinnati, Ohio.

July 24, 1972 Order extending time for filing record to 90 days from date of filing notice of appeal, filed. Copy handed to U.S. Attorney by Clerk.

Aug. 28, 1972 Judgment and commitment returned by delivering defendant on 8-28-72 to Terre Haute, Indiana (U.S. Penitentiary); and filed.

Sept. 27, 1972 Original Transcript of Proceedings, filed.

Sept. 27, 1972 Certified record on appeal mailed to U.S. Court of Appeals, Cincinnati, Ohio.

INDICTMENT

(Filed April 28, 1972)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA,
v.
MARVIN ALLEN SHAFER
} Criminal No. 17,967

The Grand Jury charges that on or about the 20th day of June, 1971, in the Eastern District of Tennessee, MARVIN ALLEN SHAFER knowingly and intentionally did unlawfully possess with intent to distribute and dispense

a controlled substance, that is, approximately 49,960 Biphetamine capsules, each capsule containing d- and dl-Amphetamine, a controlled substance under Schedule III, Title 21, Section 812, United States Code, and approximately 2,000 Benzedrine tablets, each tablet containing a quantity of Amphetamine Sulfate, a controlled substance under Schedule III, Title 21, Section 812, United States Code. (Title 21, U.S.C., Section 841 (a) (1)).

/s/ John L. Bowers, Jr.
United States Attorney

/s/ W. B. Jones, Jr.
Foreman

TRANSCRIPT OF PROCEEDINGS

(May 29, 1972)

[117] * * *

Mr. Lockridge: At this time, Your Honor, I would respectfully ask the Court to direct the jury to return a verdict of acquittal on the ground of entrapment by law as stated in the case of—

[118] The Court: I am familiar with that doctrine, the doctrine of entrapment. You need not explain it.

Have you got any other grounds to make. I don't care to hear any argument on it.

Mr. Lockridge: Yes, sir. I would also like to ask the Court to dismiss it on the ground there is no evidence whatsoever that anything they have testified to or ever confiscated came from the possession of Marvin Shafer.

The Court: All right, that is ground No. 2. What are your other grounds?

Mr. Lockridge: I would like, well, those are only the grounds on the motion for a directed verdict.

The Court: The motion is overruled . . .

[DEFENDANT'S] PROPOSED INSTRUCTION #1

(Filed May 30, 1972)

You are instructed that simple possession of the drugs involved in this case is a lesser included offense of possession with intent to distribute or dispense. You must find, beyond a reasonable doubt, that the defendant possessed the drugs with intent to distribute them to others, if you do not so find, then you must acquit him of the charge, as stated, in the indictment, but may convict him of the lesser included offense of simple possession, if you have found simple possession beyond a reasonable doubt.

Respectfully submitted,

/s/ John D. Lockridge

[DEFENDANT'S] PROPOSED INSTRUCTION #2

(Filed May 30, 1972)

You are instructed that you may not consider any previous illegal or unlawful possession of drugs in ascertaining the defendant's guilt beyond a reasonable doubt.

Respectfully submitted,

/s/ John D. Lockridge

[DEFENDANT'S] PROPOSED INSTRUCTION #3

(Filed May 30, 1972)

You are charged in the instant case that physical presence at the scene of the defendant would be necessary for conviction herein.

Respectfully submitted,

/s/ John D. Lockridge

A5

JUDGMENT AND COMMITMENT

(Filed June 27, 1972)

On this 27th day of June, 1972 came the attorney for the government and the defendant appeared in person and by attorney.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of knowingly and intentionally possessing with intent to manufacture, distribute or dispense a controlled substance drug, that is, Biphetamine and Benzedrine capsules, in violation of Title 21, §§812, U.S.C., 841(a)(1), as charged in the one count of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS from and after this date.

IT IS ADJUDGED that this defendant is eligible for parole at such time as the Board of Parole may determine, as authorized by Section 4208(a)(2), Title 18 U.S.C.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Robert L. Taylor
United States District Judge

/s/ Karl D. Saulpaw, Jr.
Clerk

NOTICE OF APPEAL

(Filed June 30, 1972)

Notice is hereby given that Marvin Allen Shafer, defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the judgment entered in this action on the 27th day of June, 1972. The judgment entered on that date adjudged the defendant guilty as charged and convicted of knowingly and intentionally possessing with intent to manufacture, distribute or dispense a controlled substance drug, that is, Biphetamine and Benzedrine capsules, in violation of Title 21, §§812 U.S.C., 841(a)(1), and sentenced him to be committed to the custody of the Attorney General for imprisonment for a period of five (5) years on and after the date of the entry of the Order.

/s/ John D. Lockridge
John D. Lockridge, Attorney
6th Floor, Valley Fidelity Bank Bldg.
Knoxville, Tennessee 37902

A copy of this Notice of Appeal has been delivered to the office of John Bowers, United States Attorney for the Eastern District of Tennesee, Northern Division.

This 30th day of June, 1972.

/s/ John D. Lockridge
John D. Lockridge, Attorney

IN THE UNITED STATES COURT OF APPEALS
EASTERN DISTRICT

ORDER

(Filed July 24, 1972)

IT IS HEREBY ORDERED that the time for the filing of the record in this cause is extended from forty (40) days to ninety (90) days to allow the Federal Court Reporter sufficient time within which to prepare the transcript of the proceedings.

ENTER this ..... day of ....., 1972

Judge

/s/ John D. Lockridge
Attorney for Defendant

John L. Bowers, Jr.,
United States Attorney

By: /s/ Robert E. Simpson
Robert E. Simpson
Assistant U. S. Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEFENDANT-APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF AND APPENDIX

(Filed October 26, 1972)

Defendant-appellant, through his attorneys, would respectfully show unto the Court that one of his counsel, W. E. Badgett, suffered a heart attack on July 21, 1972 and

is just now resuming his full time practice of law. That said attorney did not represent him in the District Court and due to his illness has not had time to review the case, confer with co-counsel, and prepare brief and appendix which is due to be filed November 7, 1972.

WHEREFORE, defendant-appellant moves the Court to grant him fifteen (15) additional days from and after November 7, 1972, or to and including November 22, 1972 within which to file brief and appendix in this cause.

John D. Lockridge and W. E. Badgett,
Attorneys for Defendant-Appellant
By: /s/ W. E. Badgett
W. E. Badgett
608 Bank of Knoxville Building
Knoxville, Tennessee 37902

CERTIFICATE OF SERVICE

I hereby certify that I have this day forwarded copy of the foregoing Motion for Extension of Time to United States of America, by placing same in the United States Mails, postage prepaid (addressed to the Honorable John L. Bowers, Jr., United States Attorney, U. S. Post Office and Courthouse Building, Knoxville, Tennessee, this 24th day of October, 1972.

/s/ W. E. Badgett

FINAL EXTENSION TO
11/22/72 GRANTED
Entered by the Clerk
Pursuant to Rule (4F)
Sixth Cir. Rules
/s/ James A. Higgins
Clerk

72-1968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARVIN ALLEN SHAFER,
Defendant-Appellant.

ORDER

(Filed April 17, 1973)

Before: WEICK, MILLER and KENT, Circuit Judges.

This case came before a panel of this Court designated by the Chief Judge pursuant to the provisions of Rule 3(e), Rules of the Sixth Circuit.

The appellant Shafer was convicted in the Eastern District of Tennessee, Northern Division on one count of possessing with intent to disperse a controlled substance in violation of 21 U.S.C. §1812 and §841(a)(1). Challenging his conviction on appeal, the defendant insists that under the facts as developed at trial, the District Court should have held that he was unlawfully entrapped as a matter of law. We have carefully considered this contention along with the other contentions advanced by the defendant, but we find that the contentions are without merit and that the judgment of conviction should be and it hereby is affirmed.

Entered by Order of the Court

/s/ James A. Higgins
Clerk

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1972

NO. .....

MARVIN ALLEN SHAFER,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To The Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States:

Petitioner moves that the time within which he may file a petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on the 17th day of April, 1973, in the cause pending therein entitled United States of America v. Marvin Allen Shafer, be extended from the 17th day of May, 1973, to and including the 16th day of June, 1973.

STATEMENT OF THE CASE

Defendant was indicted April 28, 1972 in the United States District Court for the Eastern District of Tennessee, Northern Division at Knoxville, in a one-count indictment, charging that on or about June 20, 1971, he knowingly and intentionally, in said District, unlawfully possessed with intent to distribute and dispense a controlled substance, approximately 49,960 Biphetamine capsules, each capsule containing d- and dl- Amphetamine, a controlled substance under Schedule III, Title 21, Section 812, United States Code, and approximately 2,000 Benze-

drine tablets, each containing a quantity of Amphetamine Sulfate, a controlled substance under Schedule III, Title 21, Section 812, United States Code, in violation of Title 21, U.S.C., Section 841 (a) (1).

Defendant entered a plea of not guilty on May 10, 1972.

The trial commenced May 29, 1972 and concluded the same date, with the jury finding defendant guilty.

Judgment was entered June 27, 1972. Defendant was sentenced to five years imprisonment, subject to parole.

An appeal was taken to the United States Court of Appeals for the Sixth Circuit and said Court affirmed the judgment of conviction. (Opinion attached).

QUESTIONS PRESENTED

I. The District Court erred in failing to hold that defendant-appellant was entrapped as a matter of law.

II. The District Court erred in holding there was evidence that any drugs were ever confiscated or taken from the possession of defendant-appellant.

III. The District Court erred in refusing to give the following instruction at the request of defendant-appellant:

> You are instructed that simple possession of the drugs involved in this case is a lesser included offense of possession with intent to distribute or dispense. You must find, beyond a reasonable doubt, that the defendant possessed the drugs with intent to distribute them to others, if you do not so find, then you must acquit him of the charge, as stated, in the indictment, but may convict him of the lesser included offense of simple possession, if you have found simple possession beyond a reasonable doubt.

JURISDICTION

Jurisdiction of the Court is by Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit pursuant to U. S. Sup. Ct. Rule 19(1) (b), 28 U.S.C. to review the judgment of the aforesaid court in a criminal case.

REASON WHY EXTENSION OF TIME IS JUSTIFIED

Counsel, John Lockridge, represented the defendant, Marvin Allen Shafer, in the United States District Court for the Eastern District of Tennessee, Northern Division. Defendant then retained other counsel (being W. E. Badgett of Knoxville, Tennessee) for the appeal to the United States Court of Appeals for the Sixth Circuit. Defendant has only very recently retained John Lockridge as his counsel for applying to the Court for a Writ of Certiorari. Accordingly, counsel has not had time to obtain the record, for review of the case, nor to prepare the petition and accompanying brief.

John D. Lockridge
Attorney for Petitioner
Valley Fidelity Bank Building
Knoxville, Tennessee 37901

CERTIFICATE OF SERVICE

I hereby certify that I have this day forwarded copy of the foregoing Motion for Extension of Time to United States of America, by placing same in the United States Mails, postage prepaid, addressed to the Honorable John L. Bowers, Jr., United States Attorney, U. S. Post Office and Courthouse Building, Knoxville, Tennessee, this ..... day of May, 1972.

.....

SUPREME COURT OF THE UNITED STATES

No. A-1148

MARVIN ALLEN SHAFER,
Petitioner,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 16, 1973.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 14th day of May, 1973.

PERTINENT PORTIONS OF TRANSCRIPT OF PROCEEDINGS

[2] APPEARANCES:

For the Plaintiff:

Robert E. Simpson, Esquire
Carl P. McDonald, Esquire
Assistant United States Attorneys
Knoxville, Tennessee

For the Defendant:

John D. Lockridge, Esquire
Valley Fidelity Bank Building
Knoxville, Tennessee

This cause came on to be heard before the Honorable Robert L. Taylor, Judge of said court, and a jury, on Monday, May 29, 1972 and the following proceedings were had, to-wit:

[4] MONDAY, MAY 29, 1972

(At 9:07 a.m. court convened pursuant to adjournment when the following proceedings were had.)

The Court: No. 17,967, United States of America versus Marvin Allen Shafer; Mr. Simpson and Mr. McDonald for the Government; Mr. John D. Lockridge for the defendant.

* * *

[5] ELMER JOHNSTON,

called as a witness by and on behalf of the plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Simpson

Q. What is your name, please sir? A. Elmer Johnston.

Q. Where do you live, Mr. Johnston? A. Matamoros in the state of Tamaulipas in Mexico.

* * *

[6] Q. Where is Matamoros . . . A. It is across the river from Brownsville, Texas.

* * *

Q. How old are you, Mr. Johnston? A. Fifty-three.

Q. And how long have you lived in Matamoros, Mexico? A. . . . thirteen or fourteen years.

Q. Are you an American citizen? A. Yes, sir.

Q. And where were you born and reared? A. In Elwood, Indiana.

Q. Are you employed? A. Yes.

Q. Where are you employed? A. In Brownsville, Texas.

Q. In June 1971 where were you employed? A. Valley Leasing Company in Brownsville, Texas.

Q. And were you employed there in 1970, [7] at Valley Leasing Company? A. Yes.

Q. That is in Brownsville, Texas? A. Yes.

Q. And how long were you there with Valley Leasing Company? A. . . . four years.

Q. And what type work did you do for Valley Leasing Company? A. Mechanic.

Q. And what is Valley Leasing Company? A. It is a trucking company.

Q. And that is over the road drivers? A. Yes.

Q. And have you been previously employed as an over the road driver? A. I quit driving about fourteen or fifteen years ago.

Q. And have been a mechanic since then? A. Right.

Q. Do you know a Mr. Roy Ford? A. Yes, sir.

Q. . . . Where was he working then in 1970 and 1971? A. Valley Leasing Company.

[8] Q. . . . have you had the opportunity to meet a Mr. Marvin Allen Shafer? A. Yes.

Q. Is Mr. Shafer present in the courtroom? A. Yes.

Q. Would you point Mr. Shafer out? A. (Indicating) The gentleman on the end over there.

Q. You are pointing to the defense counsel table. . . . what type coat does he have on? A. It is a striped coat.

Q. . . . he has pointed to the defendant, . . .

When did you first meet Mr. Shafer? A. . . . four years ago. He was in the Valley company.

Q. Who introduced you to Mr. Shafer? A. . . . Roy Ford did.

Q. And have you had the opportunity since meeting him to see him again in Texas at any time? A. Yes.

Q. And when was it after the first time you met him that you saw him again? [9] A. . . . January of 1971.

Q. . . . where? A. At Valley Leasing.

* * *

Q. Did you have a conversation with him at that time? A. . . . first time we talked about Roy's problem.

* * *

Q. What was Roy's problem?

Mr. Lockridge: Your Honor, I object to that as being irrelevant.

The Court: It may be and may not be. He may answer. Don't go into any details.

A. Roy was caught with amphetamines.

The Court: That has nothing to do with this case unless it is connected up with this defendant, and don't let that prejudice this defendant.

Mr. District Attorney, tell these witnesses to answer what you ask them to.

Mr. Simpson: That has a direct bearing [10] on this case.

The Court: All right, let's hear it, go to it.

* * *

By Mr. Simpson:

Q. Who talked to you about Roy Ford's problem? A. Me and Mr. Shafer.

Q. What did Mr. Shafer say to you about - - - A. I don't recall exactly. He had made a following trip down there, . . . three weeks later, and we discussed how we were going to get the amphetamines or the RJS, whatever those are, . . .

Q. Are you talking about - - -

Mr. Lockridge: Your Honor, if I may, at this time I would like to approach the bench with the United States Attorney.

(The following discussion was had at the bench between Court and counsel in the presence but out of hearing of the jury.)

Mr. Lockridge: I asked for all statements that had been made by my defendant, there were confessions or admissions against interest, and this certainly was not furnished me.

The Court: Do you have any statements [11] from him, have any written statements?

Mr. Simpson: From him, no, sir.

The Court: Overruled. Go ahead.

* * *

By Mr. Simpson:

Q. Go ahead about the conversation, . . .

The Court: Just tell what this defendant allegedly said. Don't go into other conversations, and as far as you can state what he said, if anything.

A. On the second trip we discussed the transportation of amphetamines to Knoxville.

Q. . . . Would you state what the conversation was. . . . A. It has been over a year ago and I barely remember any of the conversation, only we did discuss transporting or how we were going to get them to Knoxville, and the conversation was based around that.

Q. As a result of that conversation did you do anything, . . .? A. Yes, sir.

Q. What did you do? A. I did deliver amphetamines to Knoxville.

Q. Where did you get the amphetamines? [12] A. Matamoros.

* * *

A. . . . forty thousand pills.

Q. And then did you deliver them somewhere? A. Yes, sir.

Q. Where did you deliver them? A. Knoxville.

* * *

Q. To whom did you deliver them? A. Mr. Shafer.

Q. . . . Approximately how many pills did you deliver to him?

* * *

A. About forty thousand.

Q. Were you paid money for those? A. Yes, sir.

Q. Approximately how much were you paid?

Mr. Lockridge: Your Honor, I would object [13] to that. I don't think it has anything to do with the charge that is before the Court today.

The Court: Objection is overruled. I am assuming from what the District Attorney said that you are connecting this up?

Mr. Simpson: Yes, Your Honor.

The Court: All right. Go ahead.

A. About $1500 was my part.

Q. How much were you paid for those? A. Well, Mr. Shafer had advanced me the $4,000 to buy the thousand bottles.

Q. Where did he advance the $4,000? A. . . . in Brownsville.

* * *

Q. And how did you know where to go in Knoxville? A. I did not. I had a telephone number.

Q. And did you call him . . .? A. Yes, sir.

Q. Where did you call him? A. I called, I believe at home.

* * *

[14] Q. . . . What happened then? A. We met and he gave me my money plus $4,000 more to make another trip in approximately a month later.

Q. Where did you meet - - -

The Court: What date was this when you met him and you say he gave you the $4000 additional, what date and what month?

The Witness: I believe I made my first trip up here, I believe it was in March.

The Court: What year?

The Witness: Last year, sir.

The Court: All right.

By Mr. Simpson:

Q. 1971? A. Right.

Q. And where did you meet in Knoxville? A. I believe the first trip . . . Hagaman's Truck Company?

* * *

Q. Where is that located? A. . . . on the interstate.

[15] Q. What interstate? A. Going to Nashville.

* * *

Q. Now, at the time you met him was he in any vehicle, . . .? A. Yes. I don't recall the vehicle. I believe an automobile. . .

Q. How did you make the delivery of drugs to him at that time, . . .?

Mr. Lockridge: If Your Honor, please, I would object again on the ground we are talking about something two months prior to the charge in this case, that we are discussing another offense which may or may not have occurred which has nothing to do with the question before - - -

The Court: What is that offered for?

Mr. Simpson: This is offered to show intent, motive.

The Court: Objection is overruled. I thought it was. The objection is overruled.

* * *

By Mr. Simpson:

Q. You got the drugs in Mexico? [16] A. Yes, sir.

Q. Now, how did you deliver them, . . .? A. No, they come forty in a bottle from Mexico, and I transferred them into plastic bags.

Q. How did you transport them . . . to Knoxville? A. . . . in a suitcase.

Q. Now did you use a suitcase on that first occasion? A. Yes, sir.

Q. Now, did you have occasion again after that to get some more drugs? A. Yes, sir.

Q. When was that, . . .? A. I had made, . . . three trips up here and the first one was either after February or the first part of March, and I made one in April and also in May.

Q. The one in April . . . what kind of pill did you get then? A. Amphetamines.

* * *

Q. What color are the RJS capsules? A. They are black.

[17] Q. . . . how did you deliver them on that occasion? A. In the same manner.

* * *

Q. Where did you meet Mr. Shafer . . .? A. . . . off of Interstate 75. . .

Q And did you meet at any particular place? A . . . I got off the interstate and went maybe five or six blocks and I found a telephone and I called Mr. Shafer's home.

* * *

Q. Did he meet you on that occasion? A. Yes.

Q. How did he meet you? A. I believe in a car.

Q. What type car? [18] * * *

Q. The third occasion did you have a chance to meet him again? A. Yes.

Q. When was that? A. . . . a month later.

The Court: This last one you said, but I did not catch it. Was it in March or April, the second trip you said?

The Witness: I believe I made . . . I come up here in March and April and May, and then once in June.

The Court: Now, I thought you said one time in February?

The Witness: Well, it was late February or first part of March.

The Court: Or March?

The Witness: I just don't recall sir. I am sorry.

The Court: All right. April, and you say May?

* * *

[19] By Mr. Simpson:

Q. Did you deliver any amphetamine drugs to him on that occasion? A. Yes.

Q. Approximately how many? A. Forty thousand.

Q. Of what type? A. RJS's.

Q. And where did you meet him. . . .?

* * *

A. Off the interstate going north out of town here. I believe Interstate 75.

Q. Where did you meet him, . . .? A. . . . at a service station. I stopped at one of the places . . .

* * *

Q And how did he meet you on that occasion? A. Same way, in an automobile.

Q. Do you remember what kind of automobile? A. . . . the Ford.

Q. Now, Mr. Johnston, have you ever had [20] occasion to be at his home? A. I have been at his house one time.

Q. The third time as you met Mr. Shafer, how did you carry the drugs? A. In a suitcase.

Q. Have you ever been in his home? A. Yes, sir, one time. . .

Q. For what purpose? A. For money.

Q. How much were you paid at that time? A. The same amount. I received a dollar and a half for a bottle of forty pills.

Q. . . . how much? A. $1500, $1600.

Q. . . . that was your commission? A. . . . yes.

Q How much were you paid for the pills on the third trip? A Well, the pills would run, say $4000, and my commission would make another fifteen or sixteen hundred dollars, . . . $4000 was originally, and still was, Shafer's money.

Q. . . . did you have a fourth occasion to start to make a trip to Knoxville? [21] A. Yes.

Q. When was that? A. June 19th, 1971.

Q. Where did you leave from on that date? A. Matamoros.

* * *

Q. In what type of vehicle? A. My 1965 GMC pickup.

Q. Did you get any drugs on that occasion? A. Yes, sir.

Q. What type? A. RJS's.

Q. Did you get any other drugs? A. Some hards.

* * *

A. Call them Bennies, benzedrine.

Q. . . . how many did you get? A. I think there were two thousand of them.

* * *

Q. How many of those other RJS's? A. It was about 4800. . .

[22] * * *

Q. . . . what did you do with those drugs on June 19, 1971, when you left Mexico? A. I went to work. That was on—the 19th was on Saturday, and I worked half a day on Saturday.

Q. . . . did you change the bottles, . . .? A. No. They were in my door panel . . .

* * *

Q. What time did you leave work that day? A. 12:00 or 1:00 o'clock, . . .

Q. That is at Brownsville, Texas? A. Right.

Q. And did you then, after leaving work, start to make the trip to Knoxville, Tennessee? A. Yes, sir.

Q. And when you left what time did you leave Brownsville . . .? A. . . . 1:00 o'clock . . .

Q. Did you make any stops in Brownsville [23] before you left? A. Yes. I stopped at El Centro and cashed a pay check, and went to a clothing store - - -

The Court: I don't believe those details have anything to do with this.

By Mr. Simpson:

Q. Mr. Johnston, when you left Brownsville, . . . headed toward Knoxville, what happened to your vehicle? A. I was stopped there in Elsa, Texas.

Q. How far is that from Brownsville, . . .? A. . . . thirty miles.

Q. By whom were you stopped? A. Custom agents.

Q. And what happened . . .? A. They searched my vehicle.

Q. And did they find anything? A. Yes, sir.

Q. What did they find? A. RJS's.

* * *

Q. How about . . . the benzedrine? A. They were on top of the heater . . .

Q. What happened as you were stopped? [24] A. We all went to the office of the custom agents.

Q. And at the office of the custom agents what happened? A. They wanted to continue on with the trip.

Q. Wanted you to continue your trip? A. Well, I don't remember exactly what was said . . .

Q. . . . did you agree to continue your trip? A. Yes, sir.

Q. Was that at the request of the custom agents? A. Yes.

Q. Did they promise you anything . . .? A. No, sir.

Q. Did they threaten you in any way? A. No, sir.

Q. Now, how did you continue your trip? A. We continued the trip in my pickup with Inspector Wilkins and Inspector Kuykendall.

Q. What happened to the drugs? A. We brought them to Knoxville.

Q. . . . after they stopped you what happened to the drugs? [25] A. They confiscated them.

Q. What did they do with the drugs? A. We took them to the office of the customs.

Q. Did you see what happened to them at the custom office? A. Yes, sir.

Q. What happened? A. They kept a sample.

Q. Of which drug? A. Of both drugs.

Q. What happened to the other drugs? A. They put them in a suitcase.

Q. What type suitcase? A. Just a regular traveling suitcase, . . .

Q. And then what time did you leave Brownsville, Texas? A. . . . left Brownsville . . . 11:00 o'clock at night.

Q. And did you . . . make a telephone call . . .? A. Yes, sir.

Q. Where? A. Memphis, Tennessee.

Q. And who did you call? [26] A. Mr. Shafer.

Q. What did you tell Mr. Shafer? A. That I was in Memphis.

Q. Anything else. A. . . . I would be there as soon as possible.

* * *

A. In Knoxville.

Q. And who was with you at that time? A. . . . Kuykendall.

Q. Where was . . . Wilkins? A. . . . in the car . . .

Q. Did you and Mr. Wilkins and Mr. Kuykendall continue your trip to Knoxville? A. Yes, sir.

Q. When you got to Knoxville what happened? A. First we stopped at the Holiday Inn.

Q. Do you know what Holiday Inn? A. Yes, sir, on the interstate toward Nashville . . .

Q. And when you got to the Holiday Inn what happened? A. Well, we had the suitcase with the drugs and the other suitcase, and we all went into the hotel . . . [27] and registered . . .

Q. Now at any time did you make a telephone call after that? A. Later on after that, . . .

Q. Who did you call? A. We left the motel - - -

* * *

Q. Now who left the motel? A. Me and Kuykendall left in my vehicle.

* * *

Q. And with the suitcase that had the drugs . . .? A. We put it in the seat between me and . . . Kuykendall.

Q. Was that the only suitcase you had in the pickup truck? A. That is the only suitcase we had.

Q. And when you left the motel what did you do? A. We went . . . to the corner of Beaumont and Baxter, . . .

Q. Where is that located? A. Here in Knoxville, . . .

[28] * * *

Q. . . . what time was that? A. . . . 11:30 or close to midnight . . .

Q. Now when you went to that service station what did you do then? A. I called Mr. Shafer.

Q. What did you say . . .? A. I gave my location and where I was . . .

Q. What did he say . . .? A. That he would be there.

Q. What did Mr. Kuykendall do? A. Mr. Kuykendall left the truck and walked up the hill and somewhere where he was observing.

Q. Now what did you do? A. I waited for Mr. Shafer.

Q. . . . did Mr. Shafer later arrive? A. Yes, sir.

Q. And in what type vehicle? A. It was a dark colored . . . Ford, . . .

Q. And what did you do then, . . .?

* * *

Q. Did you have a conversation with him? A. I believe we had some conversation; yes, sir.

[29] Q. What did you do then? A. . . . gave him the suitcase . . .

* * *

Q. Did you get out of your vehicle? A. Yes.

Q. Did he get out of his vehicle? A. I believe so.

Q. What did you do with the suitcase? A. Gave it to Mr. Shafer.

Q. What did Mr. Shafer do with it? A. Put it in the back seat of the car.

Q. Was that the suitcase with drugs in it? A. Yes.

Q. After you gave him the suitcase and he placed it in his car, what did you do? A. He backed out and left.

Q. After he backed out and left did you see him again? A. No, sir.

Q. And have you had occasion to see him since then? A. Not until today.

Q. Have you had occasion to talk with him? A. No, sir.

[30] * * *

Q. . . . have any promises been made to you by the United States Customs or by the United States Attorney up here for your testimony here today? A. No, sir.

Q. Have any threats been made to you? A. No, sir.

Q. . . . were you tried and convicted in the District Court for the Southern District of Texas for the possession of amphetamine drugs? A. Yes, sir.

Q. And that was for the possession of them on . . . June 19, 1971? A. . . . Yes.

* * *

Cross-Examination by Mr. Lockridge

Q. Mr. Johnston, who paid your way up here today? A. I did.

Q. You paid your own airplane ticket? A. Yes, sir.

Q. You say no promises or no threats have been made to you in any way? [31] A. No, sir.

Q. And you admit to the question that on at least four different occasions you brought a number of pills to Knoxville, Tennessee? A. Yes, sir.

Q. You pled guilty in Brownsville, . . . without the benefit of an attorney, . . . ? A. Yes, sir.

Q. You received a one-year suspended sentence? In other words you never spent one day in jail, did you? A. No, sir.

Q. And you were fined $500 and allowed to pay it at $25 per month, . . . ? A. That is right.

* * *

Q. . . . I am interested in about what time you left Brownsville, . . . to come to Knoxville, . . . A. On what occasion?

Q. . . . last occasion, the one involved in this offense. A. Approximately 10:30, 11:00 o'clock at night.

[32] Q. And you say that you had made some three trips up here? A. Right.

Q. What is the distance? A. About twelve hundred miles.

* * *

Q. How long did it take you to drive up here, normally? A. Twenty-four hours.

* * *

Q. . . . 11:00 o'clock in Brownsville, it would be 11:30 in Knoxville. . . ? A. I believe so.

Q. And did you drive a pickup truck? A. Yes, sir.

Q. All the way? A. All the way.

Q. And at the time you started out you left Brownsville, . . . how long had it been at that time since you had been to sleep? A. . . . 6:30 that morning.

[33] Q. So you had been up approximately from . . . eighteen hours when you left, then you drove for approximately twenty-four hours?

* * *

Q. Who drove? A. Mr. Kuykendall and Mr. Wilkins.

Q. You say you went to the Holiday Inn. Did you check in there and go to bed or did you immediately start on your venture? A. We did not go to bed, no.

Q. So you had not been to bed . . . in forty hours at the time this alleged delivery to Mr. Shafer took place. . . ? A. . . . I never stopped to figure it out.

Q. And how long were you with the man delivering the pills on June 19th or 20th. . . ? A. Maybe ten minutes.

Q. And how close were you to him? A. Two or three feet . . .

Q. What did he look like at that time? A. He had whiskers and sideburns.

Q. Did he have a beard? A. He had whiskers.

Q. What color . . .? [34] A. It was greyish brown . . .

Q. Did you receive any money from the man at the scene on the occasion of June 20th? A. No, sir.

Q. Wasn't it your usual custom to get the money at the time you delivered the goods? A. Yes, sir.

Q. Why on this occasion did you simply leave all the goods without the money? A. Well, he said he was going to come July 4th to Brownsville . . .

Q. . . . do you remember what day of the week . . .?

* * *

A. . . . Sunday.

Q . . . I believe you testified that you gave this man at this scene a suitcase, . . .? A. Yes.

Q. And that he put it in his car? A. It was put in his car. I don't know whether [35] he put it or I put it in, . . .

Q. You stated to Special Agent Wilkins that you put it in the car, did you not? A. I don't recall, . . .

Q. Well, is it possible that you put the suitcase in the car? A. It is possible.

Q. Was there any discussion between you two at the time about what was in the suitcase? A. Yes, sir.

Q. And you told whoever it was how much you had there, I assume? A. Yes, sir.

Q. What was the purpose of that? A. We always did.

Q. Always did? A. Yes.

Q. . . . have you ever been convicted of any other felony? A. No.

Mr. Simpson: Objection.

The Court: Overruled. It goes to the weight.

In cases like this, members of the jury, [36] we are not trying this gentleman for anything else, but the Court permits him to ask questions of that kind—you ought not to ask him unless you know you have grounds for asking a question like that. It is perfectly proper to ask it because it goes to the weight of the man's testimony, but if you don't have any basis that this man has been convicted of any other offense, then questions of that nature should not be asked.

* * *

Q. At the time when you were stopped you indicated that: "They confiscated them". Did you mean by that the custom agents stopped you? A. Yes, sir.

Q. Do you know who they were? A. Yes, sir.

Q. Who were they? A. Mr. Wilkins is the one right at the table there.

Q. Yes, and who else? A. Mr. Kuykendall and Mr. Oswald, and the others I haven't seen.

Q. This was in Elsa, Texas? A. Yes.

[37] Q. And then they took you back to Brownsville? A. Right.

Q. . . . they took samples? A. Yes.

Q. Do you know which . . .?

* * *

A. I believe it was Mr. Oswald.

Q. Did you see what he did with these samples? A. I believe he put them in envelopes, but from there I don't know. But I do believe he put them in envelopes and marked them. . . .

Q. . . . And you say that they suggested . . . you continue on your trip to Knoxville? A. . . . right.

Q. Now, would you define who they quoted . . .? A. It was the custom agents. . . .

Q. And without threat or promise you then agreed to cooperate completely with these agents . . .? A. Without a threat or no promises, yes.

Q. You agreed to cooperate with them and make the trip in an effort to catch somebody else, . . .? [38] A. Yes, sir.

Q. And you were part of the planning stage of the entire episode, . . .? A. I don't know what - - -

Q. You helped plan the entire event of June 20, 1971? A. No, sir.

Q. Did you . . . meet and talk with Agents Harold Long and Wade Ingram here in Knoxville? A. Yes, sir.

Q. Where did you meet and talk together? A. At the Holiday Inn.

Q. Were they there when you got there? A. No. . .

Q. And it was all set up at that time . . . as to how you would go about trapping Marvin Shafer, . . .?

* * *

Q. How you would catch Marvin Shafer, how you would go about giving him the drugs and arresting him, would that be fair? A. Yes, sir.

[39] Q. And you planned that both in Brownsville and . . . Knoxville prior to the time that you went out to meet Mr. Shafer; . . .? A. Would you rephrase that.

Q. You engaged in a plan both in Brownsville . . . and Knoxville . . . with the custom agents and law enforcement agents to attempt to give the drugs to Mr. Marvin Shafer and then arrest him? A. Yes, sir.

Q. That was part of the plan, . . .? A. Yes, sir.

Q. That you would give the drugs, cooperating with these Government officers, to Mr. Shafer, there would be a car in front and car in back at which time he could not move and he would be arrested for possession of drugs you just gave him? A. The plan I did not know.

Q. . . . You were not made aware of that? A. Of their plan?

* * *

A. No sir.

Q. You were only told what to do? A. Asked what to do . . .

Q. And your part of the program was simply to [40] see to it that Marvin Shafer got the drugs? A. . . . right.

Q. . . . As a matter of fact, you were told to forget the money, . . .? A. No, sir.

Q. But you had always gotten it before but did not on this occasion? A. Right.

Q. . . . there were some forty-eight hundred . . . pills . . .? A. . . . total count of the benzedrine and

RJS's . . . amounted up to fifty-one or fifty-two thousand . . .

* * *

A. Fifty-one thousand.

* * *

Q. . . . Shafer was not arrested that evening, . . .? A. . . . no.

Q. And I believe you testified that you had been to Mr. Shafer's home here in Knoxville? [41] A. I believe one time, . . .

Q. Did you attempt or help direct these agents to his residence on that evening? A. No, sir.

Q. Did you go out to his residence? A. No, sir.

Q. Do you know whether or not they did? A. I don't know. . .

Q. Do you know whether or not they fired any shots at Mr. Shafer on that evening? A. I believe they did.

Q. . . . you heard the reports of a gun, . . .? A. . . . right.

Q. Mr. Shafer had been in your home, . . .? A. Yes.

Q. . . . you all have corresponded. . .? A. Yes, sir.

Q. You have been friends, . . .? A. Yes, sir.

Q. Sort of vacationed together?

* * *

[42] A. I don't believe you call it a vacation. I never was off work at the time he was down there, but he has been in my home.

Q. And the truth is that at the time you were stopped with these fifty thousand pills the only thing you can think of is that you were going to Knoxville to give them to Marvin Shafer, . . .? A. No, sir.

* * *

(Witness excused.)

JAMES R. WILKINS,

called as a witness by and on behalf of the plaintiff, . . .

Direct Examination by Mr. Simpson

Q. State your name, please. A. James R. Wilkins.

Q. . . . where do you live? [43] A. Brownsville, Texas.

Q. And are you employed? A. Yes, sir, I am.

Q. And with whom? A. By the Customs Agency Service in Brownsville, . . . by the United States Government.

Q. How long have you been employed with Customs? A. I have been a Customs employee for five years.

Q. In what capacity? A. Three years as an inspector and two years as an agent.

Q. Were you employed with Customs as a special agent around June 19, 1971? A. Yes, sir, I was.

Q. And on that date did you have occasion to stop a vehicle that Mr. Johnston was driving?

* * *

A. . . . yes, . . .

Q. Where did you stop the vehicle? A. Approximately four miles north of Elsa, Texas.

Q. Was Mr. Johnston by himself, alone? [44] A. He was by himself . . .

Q. What other agents were with you at that time? A. Special Agent Travis Kuykendall, Special Agent Gary Oswald, and John Vandeer, and Gary Morrison of the Brownsville office.

Q. Did you at that time make a search of the vehicle? A. At that time I talked to Mr. Johnston while other agents were looking at the vehicle.

Q. Were any drugs found? A. Yes, . . .

Q. And where were they found? A. They were in two door panels of the vehicle and some over the heater of the cab...

Q. What drugs were found in the door panel? A. There were approximately 49,960 biphetamine capsules in the door panel, and 2,000 benzedrine tablets over the heater...

Q. How did you determine the amount? A. There are approximately fifty bags and each had . . . one thousand, . . . there were forty-nine sealed bags and one was open, which I was told by Mr. Johnston that one bottle was missing out of the open bag.

[45] Q. . . . Mr. Wilkins, after you had stopped Mr. Johnston and seized the drugs, what did you then do? A. I drove the vehicle and the drugs back to Brownsville, . . . and Mr. Johnston went in the vehicle with Special Agent Gary Oswald to the office. When I arrived at the office I then had a conversation with Mr. Johnston.

Q. And did you take any samples of the drugs that you had seized from him? A. Yes, sir. There were some loose pills and a few of the bags were opened up and we took samples out of several bags.

Q. . . . I show you two bags marked No. 1 and No. 2 and ask if you can identify those.

Which one are you looking at there - - - A. This is marked No. 2.

* * *

A. . . . this is my initials and the date that I signed it.

* * *

Q. Would you open the envelope up there, the white envelope, sir?

What is contained therein, . . .? A. . . . benzedrine tablets.

Q. And are they the ones or the samples that [46] you got that day? A. Yes, sir.

Q. And are those the samples that you got from the pickup truck of Mr. Johnston? A. Yes, sir.

The Court: Pass them to the jury.

Mr. Simpson: We offer that as Exhibit No. 1.

(Exhibit No. 1 was filed.)

Q. Would you open up the second envelope there? A. Yes; this is marked No. 1.

Q. What is in there? A. . . . biphetamine capsules.

Q. What is the color. . .? A. These are dark brown or black.

Q. Do you have any markings on them? A. Yes, they have the initials RJS.

Q. Are those the amphetamine drugs that you got from the truck of Mr. Johnston on June 19, 1971? A. Yes, sir.

Mr. Simpson: We offer that as Exhibit No. 2.

(Exhibit No. 2 was filed.)

[47] Q. . . . as a result of the seizure of the drugs from Mr. Johnston, did you request him to do anything? A. . . . He asked me if there was anything he could do to help us on the case, and I asked him, . . . where he was going, and he told me at that time he was going to Marvin Shafer's in Knoxville, . . .

I then asked him if he would be willing to deliver the drugs as planned, and he said yes, . . .

We also had a conversation concerning what I could do in return for him, and at this time he was told nothing, . . .

Q. And now what was done with the drugs, . . .? A. they were packed in a suitcase.

Q. What type container were they in when you got them? A. They were wrapped in separate individual thousand package bags.

Q. And after you got them what did you do with them? A. We took them and we placed them into a suitcase, . . .

Q. And then what did you do with the suitcase? [48] A. . . . suitcase remained with me until we got to Knoxville. . .

Q. Now when you got to Knoxville, . . . what did you do? A. I took the suitcase out of the trunk of the car into the Holiday Inn, and then we met agents from Atlanta, . . .

Q. Who . . .? A. George Schminky, and Mr. Long and Mr. Wade Ingram from Tennessee. One is with - - - Mr. Ingram is with the Highway Department and Mr. Long was with the Attorney General's office here in Tennessee.

Q. Did you meet any other agents there? A. Yes, sir, there was the Bureau of Narcotics agent from Nashville, . . .

Q. Do you recall his name? A. Virgil Miller.

Q. Now when you got to the Holiday Inn and checked in, what did you then do, sir? A. After we checked in Mr. Kuykendall called Mr. Wade Ingram's office and told them that we were in Knoxville at the Holiday Inn. These agents joined us at the hotel, . . . and each person looked at the drugs in the suitcase.

Q. What did you do . . .? [49] A. . . . Kuykendall and Johnston went in the pickup truck and I went in another vehicle with Mr. Schminky and Mr. Harold Long to the corner of, I believe it was Beaumont and Baxter Streets.

I am not too familiar with the town, but we went to the intersection and we set up what we called surveillance.

Q. Who was with you? A. Long and Schminky.

Q. And what type car . . .? A. We were in a Government car, . . .

Q. Approximately what time . . .? A. . . . 11:30 on the night of June 20, 1971.

Q. And were you able to see what was going on at the filling station . . .? A. I was able to observe a phone call made by Mr. Johnston, and Mr. Johnston's pickup truck pulled slightly around the corner and I only had a vision of the back end of the pickup truck.

Q. And did you at any time see any other vehicle arrive there at that service station? A. Yes, sir, I saw a dark colored, either dark blue or black, late model Ford LTD arrive at the corner, . . .

[50] Q. And then how long did you remain there - - - . . . A. . . . twelve minutes.

Q. . . . what happened? A. The Ford left the apron in the gas station, and there was another vehicle—we had another surveillance vehicle over there with Custom agents, and it reported to us that the Ford was moving

The Ford came into our view and we proceeded to follow it on the expressway, . . .

Q. Do you know what street that was on? A. . . . it is Baxter, . . . it was Baxter and Beaumont intersection . . .

Q. Now what happened . . . to the Ford automobile? A. When we got behind the vehicle, the vehicle was turning. I think he had his turn signal on to make a right turn, . . .

We stopped the vehicle on the entrance ramp to the expressway, and we blocked it . . .

Q. Where was Mr. Long? A. In the back seat of the vehicle on the right-hand side, of the vehicle that I was in.

[51] Q. Where was Mr. Schminky? A. Mr. Schminky was driving the vehicle.

Q. How did you stop the Ford . . .? A. . . . he used the siren and used the blue light . . .

Q. How did you stop it, . . .? A. We placed our car directly in front of his on an angle so that he could not proceed forward nor left or right.

Q. And was the blue light on . . .? A. Yes, . . .

Q. Was his headlights on? A. Yes, . . .

Q And were your headlights on? A Yes, sir.

Q. Do you recall whether that overpass is lighted or not? A. I believe it was quite lighted; . . .

Q. Did you get a look at the person or persons in the Ford . . .? A. Yes, sir, I did.

Q. How many people were in there? A. One was in the Ford.

Q. Were you able to recognize that person? [52] A. Yes, sir.

Q. Is that person in the courtroom today? A. Yes, . . .

Q. Would you point him out. A. The gentleman in the striped coat sitting at the defense table.

Q. That is Mr. Shafer? A. Yes, sir.

Q. Now, had you ever seen him prior to that time? A. No, sir.

Q. Do you recall how he looked at that time? A. Yes, . . . had a beard and long sideburns, dark color . . .

Q. After you stopped him, what did you do? A. I stepped out of my vehicle and approached his vehicle. I had taken about two steps and he threw his car into reverse and backed up. He then pulled forward, turning sharply to the left and just missing Agent Long and myself.

Q. Where was Agent Long? A. Agent Long had gotten out of the back seat and had got around in behind our car.

Q. Where was Mr. Schminsky? [53 A. He was still behind the wheel of our vehicle.

Q. Then what happened to the Ford . . . Shafer was in? A. It jumped over the median on the center of Baxter Street, . . . entered the exit ramp going onto the expressway flowing against the traffic.

Q. And what happened? A. Agent Miller and Agent Ingram attempted to follow Mr. Shafer's car but was slowed down by oncoming traffic leaving the expressway coming on up to the overpass on the exit road.

Q. Do you know which exit Mr. Shafer's car took? A. . . . I am not sure . . .

Q. Was it the entrance ramp or the exit ramp? A. It was the exit ramp off of the expressway onto the, . . . boulevard, so he entered flowing against traffic.

Q. And were any shots fired at the vehicle? A. Yes, . . .

Q. . . . who fired them? A. . . . Long fired directly into the engine of the vehicle and I fired twice at the rear tires.

Q. And did the vehicle stop . . .? [54] A. No, . . .

Q. Were you able to locate the vehicle? A. No, sir.

* * *

Cross-Examination by Mr. Lockridge

Q. Agent Wilkins, what is your estimate of the distance between Brownsville, Texas, and Knoxville, Tennessee? A. I believe it is twenty-four hundred miles.

Q. And would you tell us, please, by the time you reached this observation point at or near Beaumont and Baxter . . . Knoxville, how long you had been up? A. I had slept in the truck part of the way up here.

Q. How long had it been since you had been in bed? A. . . . 6:00 o'clock Friday morning.

Q. To roughly midnight Sunday? A. Yes, sir.

Q. . . . More than two days? A. Yes, sir.

Q. And you staked out somewhere in an automobile at or near Beaumont? [55] A. Yes, sir.

Q. Now you are not telling this Court and jury that you could identify Mr. Shafer from the distance where you were staked out? A. No, sir.

Q. . . . this dark Ford that keeps cropping up, pulled out onto Baxter or Beaumont, and did you pass it? A. We pulled around the side of it, and I had the blue light in my hand and I flashed the light and eased in front of it and forced it into the curb.

Q. You did not stay even with it for very long, did you? A. No, sir.

Q. And your light was flashing blue? A. Yes, sir.

Q. And in which seat were you sitting? A. In the right front.

Q. Right front seat, and you did get the car stopped? A. Yes, sir.

Q. But as you got out of the car the car behind you backed up and took off? A. Yes, sir.

Q. So after two days of no sleep and [faced] [56] momentarily with a flashing blue light, you can now come here and identify this man as the same man that had a beard as you passed him in the car that night; is that your testimony?

* * *

A. . . . When we stopped the vehicle is when I recognized Mr. Shafer. I had a light right on his face, and this is when I had a good visual sight of the man.

Q. I take it it was a flashing blue light? A. . . . it is a steady blue light.

* * *

Q. . . . on direct you said it was a flashing blue light. A. I don't recall . . .

Q. . . . after this vehicle got away, did your car attempt to go down the exit ramp the same as the other car did? A. Yes.

Q. But you were slowed up by cars coming up the exit ramp, . . .? A. One vehicle, . . .

Q. But the other car apparently got around it, or did you see what happened? [57] A. The other vehicle, by the time the three of us got back into our vehicle, the first vehicle, the Ford, had already entered onto the ramp and was almost down on the freeway. We never did see it again . . .

Q. Did you go to Mr. Shafer's home on that evening? A. Yes, sir.

Q. Did you attempt to enter? A. We knocked at the door.

Q. No one came? A. No, sir.

Q. Was there any car out there? A. I believe Mr. Shafer's pickup was in front.

Q. From your observation was there anybody in the place? A. There were lights on but apparently I could not tell if anybody was in there or not.

Q. Could you tell whether the TV was playing . . .? A. I don't recall.

Q. Do you know what address you went to? A. Yes, sir.

Q. What was the address? A. . . . it is 1312 Connecticut.

Q. Do you know what it looks like, is it an [58] apartment, a house, or what? A. . . . it is a frame house with an apartment in the basement.

Q. How many of you knocked on the door? A. Myself . . . I believe Agent Miller was with me, and I don't recall if anyone else was there or not.

Q. And did you knock on the door of the basement apartment or the house? A. The basement apartment.

Q. You were advised that is where Marvin Shafer lived? A. Yes, sir.

Q. By whom? A. By Agent Long, and Agent Ingram.

Q. . . . How many cars were at the scene there at Beaumont and Baxter?

* * *

A. We had two vehicles.

Q. Just the pickup and your car. Was there a third car? A. There was my vehicle I was in and the vehicle that Wade Ingram and Virgil Miller were in.

Q. And that is sort of a V intersection with [59] about three service stations. . . ? A. Two service stations, . . .

Q. And do you know which street you were parked on? A. . . . we were on Baxter. No, I don't . . . it could have been Beaumont. . .

Q. Were you on a hill looking down? A. Yes.

Q. And did you have to turn in any to pick up this black or dark Ford when you started following it? A. No, sir.

Q. So you just continued straight around in and pulled over and stopped? A. Yes, sir.

Q. And was the other car on the intersecting street to the street you were on? A. Our other vehicle, yes. . .

Q. Was it in your view at the same time the pickup was in view? A. What car are you talking about? Our other vehicle?

Q. Yes, the other agents. A. I could not see the agents' vehicle. . .

Q. Now believe at the time that you say you [60] stopped Mr. Johnston that he inquired what he could do to help himself? A. Yes, sir, he inquired that.

Q. And in response to the inquiry I understand that you said, "Would you be willing to go to Knoxville and deliver these pills to Marvin Shafer?" A. I asked Mr. Johnston who the pills were for, and he told me Mr. Shafer.

* * *

A. I asked him if he would be willing to deliver the drugs to Mr. Shafer, and he said yes, he would.

Q. And the plan or program was to see to it that Mr. Johnston did in fact deliver them to Marvin Shafer, and as soon as Marvin Shafer had the possession to arrest him for possession of these drugs? A. Yes, sir.

* * *

(Witness excused.)

* * *

GARY OSWALD,

called as a witness by and on behalf of the plaintiff, . . .

[61] *Direct Examination by Mr. Simpson*

Q. State your name, please. A. Gary Oswald.

Q. And Mr. Oswald, where do you live? A. I live in Brownsville Texas.

Q. Are you employed? A. Yes, sir.

Q. By whom . . ? A. I am employed by the United States Customs.

Q. In what capacity? A. As a special agent.

Q. Mr. Oswald, did you have occasion on June 19, 1971 to participate in the stopping of a vehicle near Brownsville, . . . ?

The Court: This other agent has gone over that. Just let him testify what he did and go right to the point without going into all these details. Go ahead. Just tell what you did.

The Witness: Okeh, Your Honor. Probably start after we made the arrest and went back to the office with the seized contraband.

By Mr. Simpson:

Q. Was that in Brownsville? [62] A. Yes, sir.

Q. You got from Mr. Johnston? A. Yes.

* * *

A. I took samples from the bag of pills and marked them and placed them in an envelope and locked them in a locker and had custody of them until the 25th of the same month.

* * *

Q. That being June 1971? A. That is when I first took custody of them, . . . then when Mr. Wilkins returned from Knoxville, we together went to the Custom Seizure Clerk.

Q. Who is the Custom Seizure Clerk? A. . . . Valarie Trimble.

Q. What did you do? A. We turned the merchandise or contraband over to her.

Q. That was the samples? A. . . . yes.

Mr. Simpson: Your Honor, may the witness see Exhibits 1 and 2 and see if he can identify them?

(The exhibits were passed to the witness.)

* * *

[63] Q. Would you look on the inside, . . .? A. It is. I wrote 23 benzedrine tablets on this one, dated it and initialed it, and it was also initialed by Agent Wilkins.

And these are the 100 roughly of the RJS capsules.

Q. That you turned over? A. That we turned over to Mrs. Trimble, yes.

* * *

Cross-Examination by Mr. Lockridge

Q. Your home is Knoxville? A. No, sir.

Q. And so you never saw Mr. Shafer before today, . . .? A. No, sir.

Q. And I take it that you never confiscated or seized any drugs whatever that came from the possession of Marvin Shafer? A. No, sir.

* * *

Redirect Examination by Mr. Simpson

Q. . . . Are those drugs [64] Exhibits 1 and 2, representative samples from those seized from Mr. Johnston? A. Yes, sir.

* * *

Mr. Lockridge: Your Honor, I hate to do this, but could we have about a five-minute recess?

The Court: Don't talk about the case, members of the jury; do not talk among yourselves until you go to your room to deliberate.

If there is anything in the newspaper about the case, do not read about it until you render a verdict, and that applies to television and radio also.

Now, we are going to take a short recess and have this next witness on the witness stand when we come back in here. . .

(A short recess was had, after which the following proceedings were had.)

The Court: All right, gentlemen, you may proceed.

TRAVIS KUYKENDALL,

called as a witness by and on behalf of the plaintiff, . . .

[65] *Direct Examination by Mr. Simpson*

Q. Would you state your name, please. A. Travis Kuykendall.

Q. Mr. Kuykendall, where do you live? A. Brownsville, Texas.

Q. Are you employed? A. Yes, sir.

Q. By whom? A. I am a special agent for the Bureau of Customs, . . .

Q. How long have you been with the Bureau of Customs, . . .? A. About six years.

Q. Mr. Kuykendall, getting down right to the point, on June 19, 1971, did you accompany Mr. Wilkins and Mr. Johnston to Knoxville, Tennessee? A. Yes, . . .

* * *

Q. Now what time did you get to Knoxville, [66] . . . A. It was on the 20th of June about 10:30 p.m. . . .

* * *

Q. Now what did you do, sir? A. We went to a motel here, I believe the Holiday Inn; where we met with some local officials. We went over to an area, I am not sure of the address, over to a service station here, and I traveled from the motel to that area in the pickup truck with Mr. Johnston, and we arrived at that area, I got out of the pickup and walked off and he made a phone call.

Q. Let's go back to the motel. Did you have a suitcase there? A. Yes, . . .

Q. What was in the suitcase? A. It was approximately . . . 52,000 . . . amphetamine capsules and some pills.

Q. What did you see done with that suitcase? A. Mr. Johnston and K took it with us. . .

Q. Where was the suitcase placed in the vehicle? [67] A. It was sitting between us.

Q. . . . in the pickup truck? A. Yes.

Q. . . . were there any other suitcases in the pickup truck at that time? A. No, sir.

Q. And then you went to the service station? A. Yes, sir.

Q. The call was made? A. Yes.

Q. By Mr. Johnston? A. Mr. Johnston made the phone call . . .

Q. Where did you go at that time after the phone call . . .? A. I walked about a block away. Again I am

not sure of the direction . . . but I walked about a block, stood on the corner, and watched Mr. Johnston stay at the truck. The service station was closed. . .

Q. What did you observe then? A. Approximately thirty or forty minutes later a late model Ford automobile, . . . came up with a young man in it.

Q. Did you see what happened then? A. He talked to Johnston for . . . [68] thirty minutes, and they took the suitcase out of the pickup truck and put it in the car and the car left.

Q. Who placed it in the car, . . .? A. I couldn't tell . . . I saw them get it out of the pickup truck, they were both there, and I couldn't see who put it in the car.

Q. Was that the suitcase that had the amphetamine drugs in it? A. Yes.

Q. What else did you do? A. I stayed where I was until the Ford automobile left, and I walked in that direction and then again met with Mr. Johnston and later went back to the motel.

* * *

Cross-Examination by Mr. Lockridge

Q. Did you ride up to Knoxville from Brownsville in the pickup truck? A. Yes, . . .

Q. Did you drive all the way? A. No, sir.

Q. Who else drove? A. Mr. Wilkins and myself shared driving chores.

Q. And Mr. Johnston did not drive any, . . .? [69] A. I think he did drive when we first left. He did drive a little ways. I am [not] sure exactly where it was but he did drive part of the way for a short period of time.

Q. Did you later meet the agents Long and Miller at the Holiday Inn? A. Yes.

Q. Schminky, and so forth? A. Yes.

Q. And you participated in the plan or a program whereby this suitcase was to be delivered to Mr. Shafer at which time he would be arrested for possessing narcotics, the pills, . . .? A. Yes, . . .

Q. You say you walked about a block away from the service station? A. Yes, . . . a block. It was uphill and the block there—actually what you would count merely as a block. It was a short distance and there wasn't small streets. . .

[70] Q. The service station was not lighted, . . .? A. No, . . .

Q. . . . you couldn't tell whether . . . it was Johnston or some other figure that put the suitcase into the car? A. No, . . .

Q. And so therefore you don't know whether or not it was in fact the suitcase that you all rode out there with? A. I saw him take the suitcase out of the front of the vehicle and I saw Johnston with it, so I presume it the same suitcase.

Q. . . . a presumption? A. Yes.

Q. You did not ever see Marvin Shafer . . . that evening, . . .? A. No, sir. From a distance I saw someone I cannot identify.

Q. And did you participate in that chase of the automobile? A. No, . . .

Q. Did you go to a place identified as Marvin Shafer's home on this evening? A. No, . . .

Q. Were you able to get a license number off [71] of the Ford? A. No, . . .

Q. Did you or anyone on behalf of the custom agents or law enforcement officers attempt to get any type of search warrant or arrest warrant on that evening? A. I did not . . .

Q. Do you know anyone that did? A. . . . I went back to the motel, not with the other officers.

Q. ... that is all you know...? A. Yes, sir.

* * *

Redirect Examination by Mr. Simpson

Q. Two questions: . . . when you arrived at the filling station, how many suitcases did you have in your pickup truck? A. Just one.

Q. And you say you, after the car drove off, did you go back down there? A. Yes, . . . I walked down to the service station where - - -

Q. Did you get into the pickup truck? A. Yes, . . .

Q. Was there a suitcase in the pickup truck? [72] A. No, . . .

* * *

(Witness excused.)

WADE INGRAM,

called as a witness by and on behalf of the plaintiff, . . .

Direct Examination by Mr. Simpson

Q. ... Wade Ingram? A. Yes, sir.

Q. ... where do you live? A. Knoxville, Tennessee.

Q. And are you employed? A. Yes, sir.

Q. By whom . . .? A. State of Tennessee, Department of Safety, Tennessee Bureau of Criminal Identification as a narcotic agent.

* * *

Q. And how long have you been a narcotic agent? A. Since 1959.

Q. . . . you know Mr. Marvin Shafer? [73] A. Yes, sir.

Q. How long . . . ? A. . . . three years.

Q. Did you know him prior to June 20, 1971? A. Yes, sir, . . .

Q. Is he present . . .? A. Yes, he is.

Q. Would you point him out. . . A. Over at the table with the red tie on.

Q. What color coat? A. . . . striped coat, . . .

Q. . . . on June 20, 1971 did you participate with the United States Customs agents and Bureau of Narcotic Agents? A. Yes, . . .

Q. . . . in Knoxville? A. Yes, sir.

Q. And how did you come about to participate in that matter? A. One of the custom agents contacted me and asked me to meet him concerning a matter, a drug violation.

Q. Where did you go? A. I met him at the Holiday Inn.

Q. Who did you meet at the Holiday Inn? A. I met, the best I recall, two custom agents, [74] Federal Bureau of Narcotic Agent. Harold Long and myself met at the Holiday Inn.

Q. Who is Harold Long? A. An investigator for the Attorney General's office of Knox County.

Q. And who else did you meet at the Holiday Inn? A. Mr. Johnston.

Q. And at the Holiday Inn what did you do? A. Well, they told me what it was all about and showed me a suitcase full of pills, capsules.

Q. And what color was that suitcase? A. . . . it was blue.

Q. And did you observe the pills in the suitcase? A. Yes, . . .

Q. What type pills did you see in the suitcase? A. Black capsules, RJS.

Q. Do you know what those are called? A. . . . biphetamines.

Q. And did you observe any other type capsules? A. I saw some tablets, some heart-shaped tablets.

Q. Do you know what those were? A. Dexadrine; . . .

[75] Q. Did you see what happened to the suitcase at the Holiday Inn? A. Yes, . . .

* * *

A. . . . I saw Mr. Kuykendall and Mr. Johnston leave the motel with it, and I followed, in a pickup truck with Texas license.

Q. What was done with the suitcase at that time? A. It was placed in . . . the cab of the pickup truck.

Q. Now after that occurred, what did you do? A. Proceeded out to Interstate 75 - - -

Q. And were you by yourself or were you with someone? A. I was with Mr. Virgil Miller, the Federal Narcotic and Dangerous Drugs agent.

Q. Did you participate in a surveillance? A. Yes, . . .

Q. And where did you go to there on Beaumont? A. There are several stores there, and I was on a street running beside the stores off of Beaumont.

[76] Q. Did you see a pickup . . .? A. Yes, . . .

Q. Where was it? A. Parked in an American Oil Service Station on Baxter Avenue and Beaumont.

Q. How was it parked there, . . .? A. It was parked in the service station parking lot or in the section there.

Q. And from where you were parked were you able to see the vehicles, the pickup truck there, . . .? A. Yes.

Q. . . . how far were you from the service station? A. I say fifty, . . . yards.

Q. . . . what did you observe, sir? A. I observed another car drive up, a late model Ford, dark color.

Q. And could you see what occurred there? A. I could see two people. . .

Q. Could you recognize those two people? A. No, sir, I couldn't see their faces directly because the lighting wasn't that good.

Q. Could you tell the height of the gentlemen? [77] A. ... about the same height.

Q. And do you know approximately what height Mr. Shafer is? A. I think he is about five foot-six.

Q. And approximately what height did you observe the individual that evening? A. About five foot-six.

Q. Now what else did you see there occurring at the service station? A. I saw a suitcase move from the pickup truck and placed in the Ford automobile.

Q. Could you tell where it was placed in the Ford ...? A. Yes, sir ... placed in the back seat.

Q. Could you tell which individual placed the suitcase in the back seat of the Ford? A. No, ... I could tell it was one of the parties but I couldn't tell which one.

Q. Now after that occurred what did you do? A. Agent Miller had a radio. He radioed the custom agents that the car was moving off.

Q. What car? A. The car that the suitcase was placed in.

[78] Q. After it was moving off what did you then observe, ...? A. I observed the custom agents in their car proceeding in behind the dark colored, ... Ford.

Q. Which way was the ... Ford going? A. He was headed toward Central Avenue from on Baxter over the interstate.

Q. What did you observe the custom car do? A. To stop the ... Ford.

Q. Now were you able to get up to this ... Ford? A. No, sir. I was on the other side of the bridge that goes over the interstate, and I observed the Ford, after it was stopped, the backup lights come on, and I could ob-

serve the wheels spinning backwards before I could get to the car.

Q. What did the Ford then do? A. It backed up from the custom agents' car and pulled to the left and went down the exit of the Interstate 75.

Q. Did you hear any shots fired? A. Yes, sir.

Q. Did you attempt to follow that automobile? A. Yes, sir, . . . Miller and myself did.

Q. And were you able to observe the car? [79] A. No, . . . another car coming up the interstate on the exit, and we had to slow up to get around it, and by the time we got down to the interstate we could not see the late model Ford . . .

Q. By the exit, you mean the Ford went—did it go down the exit ramp? A. Yes, went down the exit.

Q. Would that have been the wrong way? A. Yes.

Q. And you proceeded that way also? A. Yes, sir.

Q. Were you able to ever locate the car? A. No, sir.

Q. Did you have an opportunity that evening to go somewhere? A. Yes, sir.

Q. Where . . .? A. We went to several places that we might be able to find Mr. Shafer, on Connecticut Avenue, one place, and another place that I knew he might be.

Q. Were you able to locate him? A. No, . . .

Q. Now, the Connecticut Avenue, where was that, . . .? A. It is in Knoxville, over in the Lonsdale [80] section.

Q. . . . someone's home, . . .? A. . . . where Mr. Shafer was living, . . .

Q. Did you go to the house? A. Yes, sir.

Q. Did you knock on the door? A. I was with the other custom agent. He went to the door. I stayed out in the yard.

Q. Did you find any vehicle there at the house? A. There were several cars parked in the street but I didn't see that Ford.

Q. Did anyone, when you knocked at the house, . . . answer? A. No, sir.

* * *

Cross-Examination by Mr. Lockridge

Q. You first met up with the agents at the Holiday Inn here . . .? A. That is correct.

Q. And you spoke with the troopers from Texas and Mr. Johnston, and someone who came from Atlanta? A. Yes.

[81] Q. You . . . knew Marvin Shafer? A. Yes, sir.

Q. And there was planned a program that the drugs, whatever they were, would be transferred to Marvin Shafer whereupon he would be arrested for possessing drugs; that was the idea . . .? A. Deliver the capsules, yes.

Q. You testified that you knew Marvin Shafer prior to this? A. Yes, sir.

Q. Had you met him before? A. No. I had a picture of him and his record.

* * *

Q. In this effort to deal with Mr. Shafer on this particular evening, did you have any other stakeout or other surveillance to be made on any of his addresses here. . . .? A. No, . . .

Q. Who led you to 1312 Connecticut Avenue? [82] A. I don't recall . . .

Q. . . . you say that you were over in some business building away from the scene? A. . . . I was parked on the street facing Beaumont where I could see the service station.

Q. Were you in the car? A. Yes.

Q. Did you learn afterwards the name of that particular station, . . .? A. I don't remember what the name of the buildings were.

Q. You couldn't tell what the color of the suitcase was, . . .? A. When I saw it at the motel?

Q. Yes. A. It was . . . blue.

Q. But you couldn't tell the color of the suitcase that was put in the car, . . .? A. No, sir.

Q. Nor identify either of the parties? A. . . . I could have identified - - -

Q. From your distance? A. No, . . .

Q. And then when was the next time you saw [83] Marvin Shafer? A. I saw him at the Knox County court house.

Q. Did you or anyone get the license number off . . . Ford? A. . . . no, . . .

Q. . . . know of anyone that did? A. No, sir, I don't know whether they did . . .

Q. When you saw him next at the hearing, did he have any kind of cast on his arm? A. When I saw him at the court house?

Q. Yes, . . . A. Yes, . . .

Q. Could you tell from your distance whether . . . the men in that service station lot there had a beard? A. Not from where I was . . .

Q. And you say you went with Agent Miller to 1312 Connecticut Avenue after this episode? A. I don't recall whether or not he was along, or Mr. Long, and best I remember, the custom agents, maybe two of them. I don't recall . . .

Q. . . . Miller was the one that knocked . . .? A. I don't know which. I said I didn't know [84] which of the custom agents knocked . . .

Q. But you stayed in the yard? A. Yes, . . . where I could observe the door.

Q. Do you know which door was knocked on? A. It is a side door at the basement of the house.

Q. Were there lights on . . .? A. The best I recall there were lights . . .

Q. Did you get close enough to ascertain whether . . . there was any sound coming from this apartment? A. No. . . . I was outside in the yard. I couldn't have heard any sound from the inside, . . .

Q. And you can't testify that on June 20, 1971 you ever said Marvin Shafer?

* * *

A. No, . . . I only saw a person of his size, . . .

* * *

(Witness excused.)

[85] GEORGE R. SCHMINKY,

called as a witness by and on behalf of the plaintiff, . . .

Direct Examination by Mr. Simpson

Q. State your name, please. A. George R. Schminky.

Q. Where do you live? A. Atlanta, Georgia.

Q. Are you employed? A. . . . United States Customs, Special Agent.

Q. How long . . .? A. Ten years.

Q. Mr. Schminky, on around June 20, 1971 did you . . . participate in a drug matter? A. Yes, . . .

Q. . . . in Knoxville, . . .? A. Yes, . . .

Q. And did you meet some one in Knoxville? A. Yes, . . .

Q. And who did you meet . . .? A. I met Special Agent Mr. Wilkins, Special Agent Travis Kuykendall, Mr. Elmer Johnston, and Wade Ingram, and Investigator Harold Long.

[86] Q. How about a Mr. Miller, did you - - - A. Yes, Mr. Miller.

Q. Approximately what time did you get with them and where? A. . . . quarter to eleven, . . . Holiday Inn, it is on Paper Mill Road.

Q. And what occurred there . . .? A. In the room I met the agents. I viewed a blue suitcase which contained an amount of capsules.

Q. Did you see those capsules? A. Yes, . . .

Q. What color . . .? A. They were in plastic bags. Some of them were a pinkish color and others were black.

Q. Now what happened to that suitcase with the drugs . . .? A. The suitcase was removed from the motel.

Q. Did you see what happened? A. I didn't see the suitcase actually placed in another vehicle, I went for my vehicle.

Q. Who did you go with? A. I had Agent Wilkins and Investigator Harold Long in my vehicle.

Q. Where was Mr. Wilkins in your vehicle? [87] A. He was seated in the right-hand front seat.

Q. Where was Mr. Long? A. Mr. Long was in the right rear seat, and I was driving.

Q. Now, where did you all go . . .? A. We drove to a location there off of I-75, at the corner of Baxter and Beaumont Street, . . .

Q. What did you do there? A. Set up a surveillance point.

Q. Where did you park your car? A. Facing toward Beaumont and Baxter . . .

We were facing toward the gasoline station which is on the corner of Baxter and Beaumont.

Q. . . . were you in radio contact with any other vehicles? A. Yes, . . .

Q. What other vehicles? A. The other vehicles which had G.B.I. Agents Wade Ingram and Virgil Miller.

* * *

Q. Georgia Bureau of Investigation? A. Yes.

[88] Q. Did you receive a radio call from Mr. Miller? A. Yes, . . .

Q. Approximately what time did you receive that call? A. Approximately 11:40 . . . that a vehicle had pulled into the American, . . . Oil Station at the corner.

Q. . . . did you later receive another call from Mr. Miller? A. Yes, I received another call at approximately 10:50 that the vehicle was leaving.

Q. And when that vehicle left what did you do then? A. Immediately we moved down the road, came into a position behind the vehicle.

Q. What kind of vehicle . . .? A. It was a dark, late model . . . couldn't identify . . . make.

Q. . . . what did you do . . .? A. Then I pulled up alongside of the vehicle and Special Agent Wilkins flashed a blue light, and as the other vehicle stopped I positioned my car in such a way so that the car could not travel forward or travel to the right [89] or to the left.

Q. Without hitting your car? A. Yes.

Q. . . . what happened? A. Then when both cars were at a complete stop I started to get out of my vehicle. As I attempted to get out there was a squealing of tires. The other vehicle was in reverse, backing up a short length so that it would clear the back of my vehicle, it swerved to the left across the concrete median and disappeared down the up ramp of I-75.

Q. Were you able to see the driver . . .? A. I was. I saw the driver for just a split second.

* * *

Q. At the time you started to get out of your car where was Mr. Long and Mr. Wilkins? A. They had exited from the right side of my vehicle, and they were a bit to my left when the vehicle was departing.

* * *

[90] *Cross-Examination by Mr. Lockridge*

Q. You say you had met the group at the Holiday Inn? A. Yes.

Q. . . . you discussed Mr. Marvin Shafer? A. Discussed him?

Q. Well, the idea or plan was that these goods in this blue suitcase would be delivered and that the party receiving them would be arrested for possession. That was the program, . . .? A. . . . right.

Q. And you were parked up on the hill looking down at it? A. . . . it was on a slight slant, . . .

Q. Now was the service station open? A. No, it was closed.

Q. . . . not lighted? A. There were some lights there, but it wasn't—you couldn't see too well.

* * *

Q. . . . you talked about a split [91, 92] second. Would that be the second that the car passed the late model Ford? A. That would be correct.

[93] Q. . . . there was a flashing blue light? A. . . . flashing flood light type of a light.

Q. And by flashing you mean it went off and on? A. Right.

Q. It did not become steady . . . ? A. No.

Q. You say Agent Long and Agent Wilkins were with you? A. They were . . .

Q. And who was sitting in the front seat . . .? A. Agent Wilkins.

Q. Where was Agent Long sitting, . . .? A. On the right-hand side in the rear. . .

Q. Did Agent Long and Agent Wilkins depart the car both from the right-hand side. A. . . . correct.

Q. . . . would have made them quite a distance from the driver that wasn't on the same side; they would always have a better view of whoever the driver was?

[94] * * *

A. Yes, sir, I believe so.

* * *

A. I say I don't feel I am in a position to say what they saw.

Q. Did you ever take the license number off of that car? A. No, . . .

Q. As they departed the car, did the car begin backing up . . . to move out? A. . . . the car . . . started to back up and move out . . .

Q You don't know whether they were already out of the car . . .? A. Correct.

Q. . . . you don't feel in a position to swear about the identity of the driver of that car? A. That is correct.

Q. Did you go to any residence . . . that evening? A. Yes, I did.

* * *

[95] Q. And did you ever see this man on that evening? A. No, I did not.

* * *

(Witness excused.)

HAROLD LONG,

called as a witness by and on behalf of the plaintiff, . . .

Direct Examination by Mr. Simpson

Q. You are Mr. Harold Long? A. Yes, sir.

Q. Mr. Long, where do you live? A. Knoxville, Tennessee.

Q. How long have you lived in Knoxville? A. About eight years.

Q. Are you employed? A. Yes, sir.

Q. By whom . . .? A. That Attorney-General for Knox County, Tennessee.

Q. . . . what capacity . . .? A. Criminal investigator.

Q. Mr. Long, do you know Mr. Marvin Shafer? [96] A. Yes, . . .

Q. And how long have you known him? A. . . . last couple of years.

Q. . . . known him prior to June 20, 1971? A. Yes, . . .

Q. And were you able to recognize Mr. Shafer prior to June 20, 1971? A. Yes, . . .

Q. Mr. Long, on June 20, 1971 did you have occasion to meet with other officers? A. Yes, . . .

Q. Here . . .? A. Yes, . . .

Q. What did you do . . .? A. I met with a group of other officers at the Holiday Inn along with Mr. Johnston and we went out to another section of town.

Q. . . . did you view any suitcase at the Holiday Inn? A. Yes, sir.

Q. What type? A. . . . blue suitcase. . .

Q. And did you see the contents . . .? [97] A. Yes, sir.

Q. . . . see what was in it? A. Yes, sir.

Q. What . . .? A. There was two different types of pills and in plastic bags.

Q. What color . . .? A. . . . some were black and other were pink.

Q. Do you know what kind of pills . . .? A. No, sir.

Q. What happened to the suitcase? A. . . . it was exchanged at an American service station . . . corner of Beaumont Avenue and - - -

Mr. Lockridge: We object to the conclusion.

By Mr. Simpson:

Q. At the hotel, what did you see done with the suitcase? A. It was put in a pickup truck.

Q. Did you go with anyone after the suitcase was placed in . . . the truck? A. Yes, . . .

Q. Where . . .? A. I went to another section of town with Mr. Wilkins and Mr. Schminsky.

Q. Where . . .? A. . . . Baxter Avenue.

* * *

A. . . . half a block up from the corner of Baxter and Beaumont . . .

Q. What were you doing there? . . .

* * *

Q. . . . were you able to observe anything? A. Yes, . . .

Q. What . . .? A. I observed a blue and white truck pull into the American service station at the corner of Baxter and Beaumont.

Q. . . . what time . . .? A. . . . 11:30 . . .

Q. You say a truck, . . .? A. Yes, . . .

Q. And was this the truck in which the pills were placed? A. Yes, . . .

Q. The suitcase? A. Yes, . . .

Q. Then what did you observe? A. Then a very short period of time after that [99] I observed a dark colored Ford LTD pull in beside the truck.

Q. Then what did you see? A. . . . I couldn't see much going on there.

Q. What did you see later? A. I saw the car pull out?

Q. What car? A. This Ford LTD.

Q. Which way did it go? A. It was going east on Baxter Avenue.

Q. And what did you do? A. The car that I was in, we followed the car.

Q. . . . at the time you saw it pull out, . . . did any other car get in between you and the Ford? A. No, sir.

Q. What then happened? A. Well, we pulled the car over. Mr. Wilkins was on the right-hand side of the front seat, Mr. Schminky was driving . . . I was in the right-rear seat, and Mr. Wilkins put the blue light on the car and pulled it over to curb and we kind of cut in front of it.

Q. At what angle . . .? A. It was angled directly in front of the car to keep it from going forward.

[100] Q. At the time that car stopped and the time you stopped, the car you were in stopped, how close were you to the driver of the other car?

* * *

A. He was just in front of the LTD, the side of the car I was on.

Q. Were you able to observe the driver? A. Yes, . . .

Q. And did you recognize him . . .? A. Yes, sir.

Q. Who . . .? A. Mr. Shafer.

Q. How did he appear . . .? A. . . . his sideburns were longer than they are now or a little bit bushier, and he had a beard.

Q. What did you do then after your car stopped, . . .? A. We got out of the car and he gunned the motor and began backing up.

Q. What did you do . . .? A. I fired a shot . . .

Q. . . . into the car? [101] A. Right into the front, because I was standing directly in front of the car.

Q. What did the Ford do . . .? A. . . . he backed up, . . . about six or eight feet, made a sharp left turn, jumped the median strip, and went down the interstate off the exit ramp the wrong way.

Q. Were you able to apprehend the car? A. No, sir.

Q. Did you later go out to his home . . .? A. Yes, . . .

Q. Where . . .? A. . . . 1312 Connecticut Avenue.

Q. Did you observe the Ford automobile there? A. No, sir.

Q. What did you do then, . . .? A. I didn't do anything. . . .

Q. Did anyone knock on the door? A. Yes, sir.

Q. Do you recall who? A. No, . . .

[102] Q. . . . get any answer? A. No, . . .

Cross-Examination by Mr. Lockridge

Q. How long before June 20, 1971 had it been since you had seen Marvin Shafer? A. I had seen him on several occasions.

Q. . . . how long before that evening had it been since you had seen him? A. . . . probably six or eight months . . .

Q. And do you recall where he was at the time you saw him . . .? A. No, . . .

Q. What did he look like six or eight months before June 20, 1971? A. I don't recall.

Q. You don't remember. You don't remember six or eight months before that day whether or not he had a beard? A. No, sir. I don't recall whether he did.

Q. Were you shown a picture of Marvin Shafer at the Holiday Inn? A. I don't think so.

Q. You don't remember or do you know, . . .? [103] A. I don't think I have ever been shown a picture of Mr. Shafer.

Q. Do you know whether . . . anybody was shown a picture . . .? A. I don't know.

Q. . . . you don't think you were? A. I wasn't shown a picture.

Q. You weren't shown a picture, but you did know who you were going out there after, did you not? A. Yes, sir.

Q. And this was discussed at the Holiday Inn? A. Yes, sir.

Q. And the whole idea was to see to it that a certain suitcase was deposited with Mr. Marvin Shafer and then apprehend him and arrest him for possession of the contents of that suitcase? A. Yes, sir.

Q. . . . How do you know that was an LTD? A. . . . I recognize an LTD.

Q. By the shape? A. Yes, sir.

Q. From your vantage point did you know it was an LTD? A. Yes, sir.

[104] Q. Just from your surveillance you could see it. How far away were you? A. . . . half a block.

Q. And then you followed it and pulled over in front of it? A. Yes, sir.

Q. At what point was it that you realized or thought you were realizing that the driver of the car was Marvin Shafer? A. . . . Wilkins shined the blue light.

Q. Was the blue light a flashing blue light? A. . . . it was.

* * *

Q. Did he shine it on him as you passed or when you got him stopped? A. As we pulled alongside.

Q. And what period of time would you say lasted? A. From when?

Q. From the time you pulled alongside of the driver and passed him to get him stopped? A. Probably ten seconds.

[105] Q. . . . which seat were you in? A. I was in the rear seat by the window on the right-hand side.

Q. Not in the seat opposite the driver? A. Yes, sir.

Q. And you got out, and as the car was backing up you fired the shot directly into the car? A. . . . right.

* * *

A. At the motor.

Q. At no more distance than maybe from me to you, . . .? A. That would be fair.

Q. Would you deny that would be about what, twenty feet. A. Something like that, . . .

Q. . . . did you hit that car? A. . . . I did.

Q. . . . was someone else also firing at that car? A. . . . they were.

Q. Was there any stream of water where it possibly hit the radiator? A. I wasn't looking for a stream of water. I was looking at the automobile.

[106] Q. Did you ever get a license number . . .? A. No, . . .

Q. Do you know anyone that did? A. No, sir.

Q. You went out to Mr. Shafer's residence on Connecticut Avenue? A. Yes, sir.

* * *

Q. Did you know that is where he lived? A. I know that he had been there; . . .

Q. How did you know that? A. I had been there.

Q. Then you certainly knew that Marvin Shafer lived at 1312 Connecticut Avenue on the evening in question? A. . . . he did.

Q. Did you relay that information to the people at the Holiday Inn during your discussions . . .? A. I probably did.

Q. Was there any discussion about perhaps causing some surveillance to be made at 1312 Connecticut Avenue? A. No, . . .

Q. Eight - - - . . . agents of the [107] Government and you never thought of that?

* * *

(Witness excused.)

* * *

[117] (The jury was excused from the courtroom, and the following proceedings were had in the absence of the jury.)

Mr. Lockridge: At this time, Your Honor, I would respectfully ask the Court to direct the jury to return a verdict of acquittal on the ground of entrapment by law as stated in the case of - - -

[118] The Court: I am familiar with that doctrine, the doctrine of entrapment. You need not explain it.

Have you got any other grounds to make. I don't care to hear any argument on it.

Mr. Lockridge: Yes, sir. I would also like to ask the Court to dismiss it on the ground there is no evidence whatsoever that anything they have testified to or ever confiscated came from the possession of Marvin Shafer.

The Court: All right, that is ground No. 2. What are your other grounds?

Mr. Lockridge: I would like, well, those are only the grounds on the motion for a directed verdict.

The Court: The motion is overruled. Is that all at this time?

* * *

[196] Mr. Lockridge: . . . I had three requests . . .

The Court: If you will just read them right quick and I will rule on them.

* * *

Mr. Lockridge: This would be Proposed Instruction No. 1.

You are instructed the simple possession of drugs involved in this case is a lesser included offense of possession with intent to distribute or dispense. You must find, beyond a [197] reasonable doubt, that the defendant possessed the drugs with intent to distribute them to others; if you do not so find, then you must acquit him of the charge as stated in the indictment, but may convict him of the lesser included offense of simple possession, if you have found simple possession beyond a reasonable doubt.

The Court: That is refused . . .

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1697

MARVIN ALLEN SHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that he was entrapped as a matter of law, that the evidence was insufficient to support his conviction, and that the district court erred in denying his request for a lesser-included offense instruction.

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of possession of amphetamine and biphetamine capsules with intent to distribute them, in violation of 21 U.S.C. 812 and 841. He was sentenced to five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (Pet. App. A5). The court of appeals affirmed by order (Pet. App. A9).

The evidence showed that on three separate occasions during the early months of 1971, one Elmer Johnston, after receiving a $4000 advance from petitioner, drove

to Mexico and purchased approximately 40,000 amphetamine capsules, which he delivered to petitioner in Knoxville, Tennessee (Tr. 11-20; Pet. App. A18-A22). Returning from a fourth trip to Mexico on June 19, 1971, with benzedrine tablets and biphetamine capsules concealed in the door panels and above the heater of his truck, Johnston was apprehended by Customs agents in Elsa, Texas (Tr. 20-23; Pet. App. A22-24).[1] Johnston offered to assist the agents and stated that he had intended to deliver the drugs to petitioner in Knoxville, Tennessee (Tr. 47; Pet. App. A36). The agents requested that Johnston continue his trip and make the planned delivery (Tr. 23-24; Pet. App. A24). The Customs officers retained a sample of each of the two types of drugs and packed the remainder—about 51,000 benzedrine and biphetamine tablets—into a suitcase (Tr. 25, 40; Pet. App. A24-25, A32-A33).

Accompanied by Customs agents, Johnston drove north to Tennessee. From Memphis, Johnston placed a telephone call to petitioner to advise him that he would soon arrive in Knoxville (Tr. 25-26; Pet. App. A25). With the suitcase containing the drugs in the front seat of the truck, Johnston and one agent drove to a Knoxville gasoline station. Another agent and various local law enforcement officers drove to the rendezvous in a government vehicle and took a nearby position to conduct surveillance. Johnston telephoned petitioner and stated his location; petitioner agreed to meet him. Petitioner presently arrived in a dark-colored Ford automobile, and after several minutes of conversation,

---

[1] Prior to testifying at petitioner's trial, Johnston was convicted upon a guilty plea in the United States District Court for the Southern District of Texas for his possession of the drugs (Tr. 30-31; Pet. App. A27-A28).

Johnston delivered the suitcase to petitioner, who put it in the Ford (Tr. 27-29; 48, 49; Pet. App. A26-A27, A37).

Petitioner then drove away; the agents pursued and eventually overtook him. Agent Wilkins was able to identify petitioner as the occupant of the Ford (Tr. 50-52; Pet. App. A38-A39). Then, petitioner suddenly put his car into reverse, backed away from the agents' vehicles and started foward, jumped a median strip, and entered a nearby expressway, traveling in the wrong direction. Despite shots fired at the engine and tires, the agents were unable again to overtake the Ford. Petitioner subsequently surrendered to the authorities. The drugs were not recovered (Tr. 52-54, 100-101; Pet. App. A39-A40, A64).

1. Petitioner argues that the government involvement in the delivery of the drugs in the instant case constituted entrapment as a matter of law. However, as this Court reaffirmed last Term in *United States* v. *Russell,* No. 71-1585, decided April 24, 1973, the defense of entrapment is properly raised only when the criminal design is implanted by a government agent in the mind of one not otherwise predisposed to commit the offense. *United States* v. *Russell, supra,* slip op. at 13. See also *Sorrells* v. *United States,* 287 U.S. 435. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." (*Id.* at 441).

The facts of the instant case do not show that government inducement was required to implant the criminal design in petitioner's mind. Prior to any government involvement in the incident, petitioner had enlisted Johnston's assistance in procuring the drugs and

was awaiting delivery. The government did not induce the commission of the crime, but merely permitted events to take their expected course. In declining to halt the commission of an offense already in progress, the government laid a trap, not for the "unwary innocent," but only for the "unwary criminal." *Sherman* v. *United States*, 356 U.S. 369, 372.[2]

2. Petitioner challenges the sufficiency of the evidence to sustain his conviction. The facts stated above, however, demonstrate strong direct and circumstantial evidence that petitioner in fact knowingly ordered, awaited, and accepted delivery of a suitcase containing some 51,000 biphetamine capsules and benzedrine tablets. Moreover, since he had "counsel[ed], command[ed]. induce[d] and procure[d]" Johnston's possession of the pills, petitioner was a principal party to the transaction and was criminally liable for that possession under 18 U.S.C. 2. He was not guilty of merely "associating" with the person in possession. Thus, petitioner's reliance on *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9), certiorari denied, 371 U.S. 930, and *United States* v. *Hernandez*, 290 F. 2d 86 (C.A. 2), is unavailing. Viewing the evidence most favorably to the government, it is clear that the jury's verdict and petitioner's conviction must be sustained. *Glasser* v. *United States*, 315 U.S. 60, 80.

3. Petitioner also contends that he was entitled to a jury instruction regarding the lesser-included offense of simple possession of the contraband drugs. Such an

---

[2] In any event, petitioner is not entitled to claim a defense of entrapment, since the defense presented at trial was alibi (Tr. 124-130, 158-170), and when the court began to charge the jury on entrapment, petitioner specifically waived the instruction (Tr. 186-188).

instruction, however, must be justified by the evidence in the case. *Berra* v. *United States,* 351 U.S. 131, 134. "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a *disputed factual element* which is not required for conviction of the lesser-included offense." *Sansone* v. *United States,* 380 U.S. 343, 350 (emphasis added). See also *United States* v. *Sinclair,* 444 F. 2d 888 (C.A. D.C.). On this basis, petitioner would have to claim that his possession of the drugs, if proved, was solely for his own use. Cf. *Sansone* v. *United States, supra,* 380 U.S. at 352-353. As petitioner concedes, however (Pet. 8), his motive for possession was not put in issue at trial. To allow petitioner the benefit of a lesser-included offense instruction unwarranted by the evidence would, in effect, permit the jury to determine petitioner's punishment as well as his guilt. *Berra* v. *United States, supra,* 351 U.S. at 135.

In any event, even in the absence of any evidence concerning the normal amphetamine dosage or whether petitioner himself used the drugs, the only rational inference to be drawn from the unexplained possession of 51,000 pills is that petitioner intended to distribute them, especially in view of evidence that petitioner on three prior occasions in recent months had ordered and received similar quantities. See *United States* v. *Mather,* 465 F. 2d 1035 (C.A. 5), certiorari denied, 409 U.S. 1085. See also *Turner* v. *United States,* 396 U.S. 398, 422-423. "[T]he determination of what is fairly inferable from the evidence must be based on reason, calling on the understanding imparted by experience." *United States* v. *Sinclair, supra,* 444 F. 2d at 890.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

DOJ-1973-08